ZENBAY SDN BHD v. YONG CHOO KUI SHIPYARD SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC-60-02-2015]
28 JULY 2015

ARBITRATION: *Award – Error of law – Reference to court – Dispute between parties – Breach of agreement – Claim for refund of deposits and damages – Filing of application to High Court 48 days after receipt of award – Whether plaintiff applied for extension of time – Whether plaintiff complied with court directions in filing of affidavit and submission – Whether arbitrator erred in law – Whether questions of law arose from award – Whether clearly identified – Whether reference made to whole award – Whether justified for plaintiff to pay sum payable under award into court pending disposal of plaintiff's application – Whether award fair, reasonable and enforceable – Whether court's intervention warranted – Arbitration Act 2005, ss. 38 & 42 – Rules of Court 2012, O. 69 rr. 4(1), 6(1), 6(2)*

CIVIL PROCEDURE: *Arbitration – Application against arbitration award – Error of law – Breach of agreement – Claim for refund of deposits and damages – Filing of application to High Court 48 days after receipt of award – Whether plaintiff applied for extension of time – Whether plaintiff complied with court directions in filing of affidavit and submission – Whether arbitrator erred in law – Whether questions of law arose from award – Whether clearly identified – Whether reference made to whole award – Whether justified for plaintiff to pay sum payable under award into court pending disposal of plaintiff's application – Whether award could be enforced – Arbitration Act 2005, ss. 38 & 42 – Rules of Court 2012, O. 69 rr. 4(1), 6(1), 6(2)*

CIVIL PROCEDURE: *Adjournment – Application for – Court's direction to file affidavit and submission within a certain period of time – Failure to comply – Extension of time and postponement of hearing – Whether applied – Whether court to adjourn hearing of parties' respective applications – Rules of Court 2012, O. 28 & O. 32 r. 4(1)*

CIVIL PROCEDURE: *Time – Arbitration award – Setting aside – Delay – Filing of application to High Court 48 days after receipt of award – Failure to comply with mandatory time period – Whether court had power to extend time to file reference*

WORDS & PHRASES: *'any' – Arbitration Act 2005, s. 42(1) – Reference on questions of law – Whether arose from award – Whether confined to questions of law which had been decided by arbitral tribunal*

Vide a sale and purchase agreement ('agreement') dated 30 June 2007, the plaintiff purchased a tugboat and a barge ('vessels') from the defendant at a price of RM3.7 million and had duly paid the deposit sum of RM200,000

to the defendant. Disputes arose when the plaintiff failed to settle the balance purchase price and the defendant forfeited the deposit. The plaintiff alleged that the defendant was not the registered owner of the vessels and had demanded for the refund of the deposit. However, the defendant failed, refused or neglected to return the deposit to the plaintiff. The parties' dispute was then referred to arbitration where it was contended that the plaintiff knew that the defendant was not the registered owner of the vessels when the agreement was executed. It was decided that (i) the plaintiff was estopped from alleging that the defendant was not the owner of the vessels since the former continued with the agreement by paying the balance of the deposit and had applied for extensions of time to complete the agreement ('estoppel ruling'); and (ii) the plaintiff had waived its rights to terminate the agreement for alleged misrepresentation by the defendant ('waiver ruling'). As such, the arbitrator dismissed the plaintiff's claim for refund of the deposit and allowed the defendant's counterclaim for damages. 48 days after receipt of the arbitrator's award, the plaintiff filed an originating summons ('OS') to set aside the award with costs under s. 42 of the Arbitration Act 2005 ('the Act'). It was contended that the arbitrator had erred in law by deciding, *inter alia*, that (a) the defendant was the owner of the vessels; (b) the defendant did not misrepresent the plaintiff; and (c) the agreement was not breached. On the other hand, the defendant filed an application under s. 42(8)(b) of the Act for the following reasons, *ie*, (i) the hearing of the OS be stayed until disposal of the defendant's application; (ii) the plaintiff be ordered to pay the sum payable under the award into court pending the disposal of the OS; and (iii) the sum shall be paid into court within 14 days from the date of the court order. The court ruled that the defendant's application would be decided before the OS and gave directions accordingly for the parties to file their respective affidavits and written submissions before the hearing of the parties' applications. The plaintiff, however, failed to file the affidavit ('plaintiff's second affidavit') and written submission as directed by the court and orally applied for the adjournment of the hearing of the defendant's application and OS. Among the issues that arose for consideration were (a) whether there was any error of law on the face of the award which warranted the court to grant relief to the plaintiff; (b) whether the award contained an error of law which affected the rights of the plaintiff and warranted the court's intervention; (c) whether a court reference was confined to a question of law which had not been raised before the arbitral tribunal; and (d) whether the court had power to extend the 42 days period to file a court reference under s. 42(2) of the Act.

Held (dismissing defendant's application and plaintiff's OS; confirming arbitrator's award pursuant to s. 42(4)(a) of the Act):

(1) Order 32 r. 4(1) and O. 28 r. 5 of the Rules of Court 2012 ('ROC') provides the court with discretionary powers to adjourn the hearing of the defendant's application and OS respectively. On the facts, the court

would not exercise its discretion to adjourn the hearing since (i) no injustice would be caused to the plaintiff if the hearing was not adjourned; (ii) the plaintiff did not inform the court of any need to reply to the defendant's first and second affidavits; (iii) the plaintiff failed to comply with the court's directions in respect of the filing of the plaintiff's second affidavit and written submission; and (iv) the plaintiff did not make any prior application for extension of time to file the plaintiff's second affidavit and written submission or applied three days in advance for the postponement of the hearing. (*Lee Ah Tee v. Ong Tiow Pheng & Ors*; refd). (paras 21-24 & 77)

(2) A party who was successful in an arbitration had the right to enforce the award under s. 38 of the Act. If the award could be enforced under s. 38, then there was no need to apply under s. 42(8)(b) of the Act. The need to file an application pursuant to s. 42(8)(b) only arose when there may be prejudice to the applicant's right to enforce the award under s. 38, such as dissipation of assets by the "losing" party in the arbitration in order to defeat any enforcement of the award by the applicant. On the facts, there was no evidence of such prejudice. (paras 35 & 37)

(3) The fact that the plaintiff's registered and business address for service in the plaintiff's first affidavit were different from the plaintiff's registered and business address in the SSM records did not show any risk of dissipation of assets by the plaintiff so as to defeat the defendant's enforcement of the award under s. 38 of the Act. Further, the plaintiff's failure to file its financial information after the 2011 financial year did not prove any prejudice to the defendant's rights to enforce the award under s. 38. The fact that the plaintiff only made a profit of RM24,072 for the 2011 financial year may show a real risk that the plaintiff may be unable to pay costs of the OS if it was subsequently dismissed. Such a risk only justifies an application for security for costs under s. 42(8)(a) of the Act and not an application under s. 42(8)(b). (para 37)

(4) A court reference is not an appeal to the High Court against an award. Section 36(1) of the Act provides that an award is final. Only a question of law may be referred under s. 42(1) of the Act and O. 69 r. 6(1) of the ROC. The question of law should arise out of the award and not from the arbitral proceedings. Further, the question of law should substantially affect the rights of one or more of the parties under s. 42(1A). (*Awangku Dewa Pgn Momin & Ors v. Superintendent of Lands and Surveys, Limbang Division*; refd). (paras 44 & 47)

(5) The question of law should be stated in the OS as provided under O. 69 rr. 4(1)(a)(ii) and 6(2)(a) of the ROC. Further, the grounds for the court reference ('grounds') should be stated in the OS in accordance

with s. 42(2) of the Act and O. 69 r. 6(2)(b) of the ROC. Order 69 r. 6(2)(c) of the ROC requires the OS to give particulars of each grounds for the court reference on which it was contended that the arbitral tribunal had erred in law with reference to the paragraphs or passages in the award which each alleged error of law was to be found. Further, the OS and supporting affidavit should be served on each of the arbitrators in question according to O. 69 rr. 2(1)(h), (3), 4(4) and 6(4). (para 47)

(6) Neither s. 42 of the Act nor O. 69 of the ROC, expressly or by necessary implication, confines a court reference to a question of law which had not been decided by the arbitral tribunal. Section 42(1) expressly provides that "any" question of law may be referred to court. An arbitral tribunal may have committed a single error of law which had substantially affected the rights of a plaintiff. If the plaintiff was not able to identify any questions of law which had not been decided by the arbitral tribunal, there may be injustice to the plaintiff since he may be barred from filing the court reference. (para 49)

(7) The court may consider documents referred to in the award. Any question of law posed must be determined by reference to the whole award. It was not open to the plaintiff to read isolated parts of the award and ignoring the rest. In a challenge under s. 42 of the Act, the plaintiff's argument would be evaluated against the unchallenged parts of the award to determine if there was any inconsistency in the approach and positions taken. Further, the word "may" in s. 42(4) of the Act confers a discretion on the court to grant any relief as the court sees fit. (*SDA Architects v. Metro Millenium Sdn Bhd*, refd; *MMC Engineering Group Bhd & Anor v. Wayss & Freytag (Malaysia) Sdn Bhd*; refd). (paras 55-57)

(8) Pursuant to the proviso under s. 25(2) of the Courts of Judicature Act 1964 ('CJA'), this court could not exercise the power conferred by para. 8 of the schedule to the CJA to extend the 42 days period as stipulated under s. 42(2) of the Act. Further, O. 3 r. 5(1) of the ROC does not empower the court to extend the said 42 days period. On the facts, the OS was only filed 48 days after the receipt of the award by the plaintiff's solicitors. As such, the plaintiff failed to comply with the mandatory time period for court reference as provided under s. 42(2) of the Act and O. 69 r. 6(1) of the ROC and on this ground alone, the OS should be dismissed with costs. (paras 58-61, 65 & 67)

(9) In view of the arbitrator's factual findings in the estoppel and waiver rulings, it was immaterial whether (i) the defendant was the owner of the vessels; (ii) the defendant had misrepresented to the plaintiff that the defendant was the owner of the vessels; and (iii) the defendant had the

burden to deny the plaintiff's claim. In view of the estoppel and the waiver rulings, the alleged errors were not relevant. As such, the said errors did not affect the plaintiff's rights, let alone substantially affected the plaintiff's rights as required under s. 42(1A) of the Act. (paras 70 & 71)

(10) The plaintiff failed to comply with the following procedural threshold requirements, *ie*, (i) no question of law had been clearly and sufficiently identified as required under s. 42(2) of the Act and O. 69 r. 6(2)(a) of the ROC; (ii) the OS did not comply with O. 69 rr. 4(1)(a)(ii) and 6(2)(a) of the ROC for not stating the questions of law in the OS; (iii) there was contravention of s. 42(2) of the Act and O. 69 r. 6(2)(b) ROC since the OS did not state the grounds; (iv) the plaintiff had breached O. 69 r. 6(2)(c) of the ROC when the OS did not give the particulars of the alleged errors of law; and (v) the plaintiff did not comply with O. 69 rr. 2(1)(h), (3), 4(4) and 6(4) of the ROC by not serving the OS and the plaintiff's first affidavit on the arbitrator. (paras 47, 72 & 73)

(11) This court did not exercise its discretion to cure the breaches under O. 2 r. 1(1) and (3) of the ROC, with regards to the overriding interest of justice as provided under O. 1A of the ROC since the OS was doomed to fail. The arbitrator's award as a whole was fair and reasonable. Further, there was no error of law committed by the arbitrator in his process of reasoning, let alone an error of law which had substantially affected the plaintiff's rights. (paras 74-76)

Case(s) referred to:

A v. B (Arbitration: Security) [2011] 1 Lloyd's Rep 363 ***(refd)***

Abdul Mutalib Dato' Seri Razak v. The Malaysian Bar & Anor [1998] 2 CLJ 749 HC ***(refd)***

Antara Steel Mills Sdn Bhd v. CIMB Insurance Brokers Sdn Bhd [2014] 5 CLJ 707 HC ***(refd)***

Antara Steel Mills Sdn Bhd v. CIMB Insurance Brokers Sdn Bhd [2015] 5 CLJ 1018 CA ***(refd)***

Awangku Dewa Pgn Momin & Ors v. Superintendent of Lands and Surveys, Limbang Division [2015] 3 CLJ 1 CA ***(refd)***

Chip Lam Seng Bhd v. R1 International Pte Ltd [2010] 1 LNS 64 HC ***(refd)***

Damodaran v. Vesudevan [1975] 1 LNS 23 FC ***(refd)***

Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd [2013] 1 LNS 1470 HC ***(refd)***

Harold Shaw v. Wong Phila Mae [1989] 1 LNS 113 HC ***(refd)***

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***

Konkola Copper Mines plc v. U & M Mining Zambia Ltd [2014] 2 Lloyd's Rep 507 ***(refd)***

Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 ***(refd)***

MMC Engineering Group Bhd & Anor v. Wayss & Freytag (Malaysia) Sdn Bhd [2015] 1 LNS 703 HC ***(refd)***

Moondance Maritime Enterprises SA v. Carbofer Maritime Trading APS [2013] 1 Lloyd's Rep 269 ***(refd)***
OCBC Bank (M) Bhd v. CTK Enterprise Sdn Bhd [2000] 6 CLJ 158 HC ***(refd)***
Peterson Farms Inc v. C & M Farming Ltd [2004] 1 Lloyd's Rep 614 ***(refd)***
PP v. Lim Shui Wang & Ors [1979] 1 MLJ 65 ***(refd)***
SDA Architects v. Metro Millennium Sdn Bhd [2014] 3 CLJ 632 CA ***(refd)***
Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 CA ***(refd)***
Tajik Aluminium Plant v. Hydro Aluminium AS [2006] EWHC 1135 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 36(1), 37(1), (7), 38(1), 42(1), (1A), (2), (4)(a), (4)(b), (8)(a), (8)(b)
Contracts Act 1950, s. 66
Courts of Judicature Act 1964, s. 25(2)
Rules of Court 2012, O. 1A, O. 2 r. 1(1), (2), (3), O. 3 r. 5(1), O. 20 rr. 5(1), 7, 8(1), O. 28 rr. 4(2), 5, O. 32 r. 4(1), O. 59 r. 21, O. 69 rr. 2(1)(h), (3), 4(1)(a)(ii), (4), 6(1), (2)(a), (2)(b), (2)(c), (4)
Arbitration Act 1996 [UK], ss. 66, 67, 68, 69, 70(7), 80(5)

For the plaintiff - S Sundarajan; M/s Sundarajan & Assocs
For the defendant - Ben Lau Le Bin; M/s SN Fam & Co

Reported by Kumitha Abd Majid

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This case discusses, among others, the following questions:

(a) the High Court's power under s. 42(8)(b) of the Arbitration Act 2005 (AA) to order money payable in an arbitral award (award), to be paid into court pending the court's determination of a reference of question of law arising out of the award under s. 42 AA (court reference);

(b) whether a court reference is confined to a question of law which has not been raised before the arbitral tribunal;

(c) whether the court has power to extend the 42 days period to file a court reference under s. 42(2) AA; and

(d) in deciding the question of law in a court reference, should the court apply the "error of law on the face of the award" test or the "process of reasoning" test of the arbitral tribunal?

Background

[2] By way of a sale and purchase agreement dated 30 June 2007 (agreement), the plaintiff company (plaintiff) purchased a tugboat and a barge (two vessels) from the defendant company (defendant) at a price of RM3.7 million (price).

[3] The plaintiff made the following four payments to the defendant totalling RM200,000 as deposit for the purchase of the two vessels (deposit): A

(a) RM50,000 on 11 June 2007 (before the signing of the agreement);

(b) RM50,000 on 25 June 2007, the date of execution of the agreement;

(c) RM47,000 on 5 July 2007; and B

(d) RM53,000 on 4 September 2007.

[4] The agreement provided for, among others, as follows:

(a) clause 1 – the plaintiff had inspected the two vessels and had agreed to purchase the two vessels on an "as is where is basis"; C

(b) clause 2(ii) – as "security" for the fulfilment of the agreement, the plaintiff "shall pay a non-refundable" deposit;

(c) clause 2(iii) – the balance of the price, namely RM3.5 million (balance purchase price), "shall to be paid" in full within 14 days from the date of notice from the defendant to the plaintiff to take delivery of the two vessels; D

(d) clause 16(ii) – "Any dispute arising out of or in connection with" the agreement, "including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Malaysia" (arbitration clause). The arbitration clause also provided that the award "shall be final and binding on both parties"; and E

(e) there were two "Certificates of Singapore Registry" attached to the agreement (two certificates) which stated that: F

(i) the owner of the tugboat is Lingcotug Pte. Ltd.; and

(ii) the owner of the barge is Lingco Marine Services Pte. Ltd. Both parties signed on the two certificates.

[5] The plaintiff did not pay the balance purchase price and the defendant forfeited the deposit. G

[6] The plaintiff alleged the following:

(a) the balance purchase price was not paid because when the plaintiff did a search with the Singapore's Registry of Ships, the plaintiff discovered that the registered owner of the two vessels was not the defendant; and H

(b) plaintiff had demanded for the refund of the deposit from the defendant but the defendant had failed, refused or neglected to do so.

[7] The plaintiff filed Civil Suit No. 52-6314-2008(1) in the Johor Bahru Sessions Court against the defendant (plaintiff's civil suit). I

[8] In the plaintiff's civil suit, the plaintiff obtained a judgment in default against the defendant on 13 October 2008 (default judgment).

[9] On 29 May 2009, based on the default judgment, the plaintiff obtained a "Garnishee Order To Show Cause" (garnishee order) against Public Bank Bhd (bank) so as to garnishee funds in the defendant's account with the bank.

[10] Pursuant to the garnishee order, the bank froze the defendant's account with the bank.

[11] The defendant applied successfully to the Sessions Court to set aside both the garnishee order and the default judgment with costs to be paid by the plaintiff to the defendant. The defendant also obtained a court order to refer to arbitration both the plaintiff's claim and the defendant's counterclaim.

[12] The arbitration was conducted before a sole arbitrator, Mr Arun Krishnalingam (arbitrator).

[13] The defendant contended that:

(a) the plaintiff knew the defendant was not the registered owner of the two vessels when the plaintiff executed the agreement; and

(b) the plaintiff breached the arbitration clause by commencing the plaintiff's civil suit.

[14] On 15 December 2014, the arbitrator handed down the award which:

(a) dismissed the plaintiff's claim for the refund of the deposit; and

(b) allowed the defendant's counterclaim as follows:

(i) damages amounting to RM41,545.50 to be paid by the plaintiff to the defendant (damages);

(ii) 5% interest per annum on the damages from 20 December 2012 until full payment of the damages; and

(iii) costs of RM27,123.60 (arbitration costs).

Court Proceedings

[15] The plaintiff filed the originating summons (OS) on 6 February 2015 to set aside the award with costs under s. 42 AA.

[16] The affidavit in support of the OS (plaintiff's first affidavit) alleged that the arbitrator had erred in law on the following seven matters:

(a) the arbitrator had erred in law by deciding that the defendant was the owner of the two vessels despite the fact that the agreement did not provide as such. At the same time, the arbitrator had also held that if the defendant was not the owner of the two vessels, such a fact did not affect the agreement (first alleged error);

(b) the arbitrator had erred in law by holding that there was no misrepresentation by the defendant and even if there was such a misrepresentation, the plaintiff had waived such a misrepresentation (second alleged error);

(c) the arbitrator had erred in law by deciding that there was no breach of the agreement (third alleged error);

(d) the arbitrator had erred in law by not deciding on the issues raised by the plaintiff and the arbitrator had failed to state that the burden was on the defendant to deny the plaintiff's claim (fourth alleged error);

(e) the arbitrator had erred in law by allowing the defendant's counterclaim which should have been tried in the Johor Bahru High Court (fifth alleged error);

(f) the arbitrator had erred in law and had committed a "misconduct" by informing the parties by letter on 12 November 2014 that the award was ready but did not hand down the award until the parties had delivered documents in respect of the arbitration costs (sixth alleged error); and

(g) the arbitrator had erred in law by failing to decide on the issue under s. 66 of the Contracts Act 1950 (CA) whereby the plaintiff was entitled to a refund of the deposit from the defendant (seventh alleged error).

[17] The defendant not only resisted the OS but filed court enclosure no. 4 (defendant's application) under s. 42(8)(b) AA for, among others, the following orders:

(a) the hearing of the OS be stayed until the disposal of the defendant's application;

(b) the plaintiff be ordered to pay RM73,335.90 (the sum payable under the award until 20 March 2015) (sum) into court pending the disposal of the OS. The sum had been computed by totalling the damages, interest on the damages (from 20 December 2012 until 20 March 2015 which amounted to RM4,666.80) and arbitration costs; and

(c) the sum shall be paid into court within 14 days from the date of the court order and upon the plaintiff's failure to do so, the OS shall be dismissed with costs.

The defendant's application is supported by one affidavit (defendant's first affidavit).

[18] The OS and the defendant's application were first heard by me on 2 April 2015. On that day, I gave the following directions (court's directions) under O. 28 r. 4(2) of the Rules of Court 2012 (RC):

A (a) the defendant's application would be decided before the OS;

(b) all affidavits would be filed and used by both parties for both the defendant's application and OS;

(c) the plaintiff should file a second affidavit (plaintiff's second affidavit) to:

B (i) oppose the defendant's application; and

(ii) support the OS

– on or before 16 April 2015;

C (d) the defendant to file the second affidavit (defendant's second affidavit) to:

(i) support the defendant's application; and

(ii) oppose the OS

D – on or before 30 April 2015;

(e) no further affidavit should be filed by any party after the above affidavits without leave of court; and

(f) written submissions should be filed and served simultaneously by each party on the other party on or before the hearing of the defendant's E application and OS on 5 May 2015.

[19] Before 5 May 2015:

(a) the plaintiff did not file the plaintiff's second affidavit and its written submission (plaintiff's written submission); and

F (b) the defendant's second affidavit and the defendant's written submission (defendant's written submission) had been filed.

No Adjournment Of Hearing Of Defendant's Application And OS

[20] On 5 May 2015, the hearing of the defendant's application and OS, G the plaintiff's learned counsel orally applied to adjourn the hearing of the defendant's application and OS on the ground that the plaintiff would file the plaintiff's second affidavit and plaintiff's written submission. No reason was given by the plaintiff's learned counsel for such an application except that 5 May 2015 was the first hearing date of the defendant's application H and OS.

[21] Order 32 r. 4(1) and O. 28 r. 5 RC provide discretionary power for the court to adjourn the hearing of the defendant's application and OS respectively. Order 28 r. 5 and O. 32 r. 4(1) RC read as follows:

I

Order 28 rule 5	*Adjournment of originating summons*
rule 5	*The hearing of an originating summons by the Court may, if necessary, be adjourned from time to time to a particular date, as may be appropriate,* and the powers of the

Court under rule 4 may be exercised at any resumed hearing. A

Order 32 rule 4 *Adjournment of hearing*

rule 4(1). *The hearing of a notice of application may be adjourned from time to time, either generally or to a particular date, as may be appropriate.* B

(emphasis added).

[22] The following cases illustrate how the court should exercise its discretionary power to adjourn the hearing of a matter:

(a) in *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 at p. 189; [1984] 1 MLJ 107, at p. 109, Hashim Yeop Sani FJ (as His Lordship then was) delivered the following judgment of the Federal Court: C

> *The discretion of the Judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in Dick v. Piller [1943] 1 All ER 627. We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:* D
>
> (1) *Whether or not a party should be granted an adjournment is wholly at the discretion of the Judge. He would exercise the discretion solely upon his view of the facts.* E
>
> (2) *Prima facie this discretion is unfettered.*
>
> (3) *The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.*
>
> (4) *Although an appellate court has power to interfere with the Judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.* F
>
> (5) *An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion.* G
>
> (emphasis added); H

(b) Yong Pung How J (as His Lordship then was) in the Singapore High Court case of *Harold Shaw v. Wong Phila Mae* [1989] 1 LNS 113; [1990] 1 MLJ 205, at 206-207 (CLJ) and 207-208 (MLJ), held as follows:

> **The first question before me then was whether I should grant an adjournment**. In divorce proceedings, as in other matters, the court has an inherent power to adjourn a hearing in order to do justice between the parties. *Adjournment is a judicial act, but it is a matter of discretion for a judge to exercise according to the facts and* I

A *circumstances of each case. In considering an application for an adjournment to enable a party to file further affidavits, a court should decide whether the additional evidence which the applicant's counsel states will be the subject of these further affidavits would help the court materially in deciding on the matter before it: if it could, a refusal to grant the adjournment might result in a decision which was based on incomplete* B *evidence and to a possible injustice to the party who has been denied the opportunity. Sometimes, it might even be that an adjournment should be given just to enable the judge to decide first whether, on the evidence already available to him, further evidence would be necessary or desirable*.

…

C So far as the application for adjournment by Mr Cashin was concerned, I was unhesitatingly of the view that, while the respondent's association with Mr Sage might be relevant, it was by no means the most relevant of the factors to be considered in deciding on the respondent's application before me. Quite apart from any reference to Mr Sage and subject to any help which D counsel might be able to give me in their submissions, there was already much more than sufficient evidence for me to consider the issue of custody. *I could not see how an adjournment to file further affidavits about Mr Sage by a former wife of his, and by a Pastor Coyle, could add anything to help the court in deciding on the issue. I therefore* E *refused the application for an adjournment*.

(emphasis added);

(c) in *Abdul Mutalib Dato' Seri Razak v. The Malaysian Bar & Anor* [1998] 2 CLJ 749, at pp. 751-752, Azmel Maamor J (as His Lordship then was) delivered the following judgment of a three-member coram of the High F Court (hearing an appeal in respect of a disciplinary matter concerning an advocate and solicitor):

This case was fixed for hearing on 28 August 1997. Notice had been issued to all parties on 15 August 1997. There was no denial as to the receipt of the notice of hearing by the parties concerned. G However on the day for hearing, counsel for the appellant, Cik D. Nair of Tetuan Nik Saghir & Ismail applied for a postponement. **As postponement is at the absolute discretion of the court, we asked the counsel the reason for the postponement**. She informed us that the counsel dealing with this case was Encik Nik Saghir who did not come to court on that day. When asked H why Encik Nik Saghir was not in court Cik D. Nair was not able to give any reasonable explanation. **We then told her that without giving satisfactory reasons we could not grant any postponement**. We also informed her that this was an old out-standing case and it was not easy to obtain mutually suitable dates for the three judges who all have very heavy schedules of I other cases to hear. Cik D. Nair was unable to furnish us with any satisfactory reason why Encik Nik Saghir did not appear in court. *In the circumstances we told her that her application for a*

postponement was not granted for want of any satisfactory reason. We then asked her to proceed with the appeal. She informed us that she was not prepared to proceed with the appeal. It is highly improper for any counsel appearing in court applying for postponement to think that a postponement can be granted as a matter of right. As such the appeal was struck off.

The court expressed great concern regarding counsels appearing in court but not ready to proceed with hearing of the cases. It would seem that Cik D. Nair in this case appeared in court with the idea that she could get a postponement as a matter of right. It is most improper to preempt the decision of the court. When a case is fixed for hearing the counsel who appears in court must ensure that he is ready to proceed for the hearing even though the counsel intends to apply for a postponement because granting of a postponement is at the discretion of the court. In exercising the discretion the court has to consider the merits of the application. The court will only grant a postponement if the court finds the reason given to be satisfactory. Otherwise the postponement will not be granted. For such purpose it would be prudent for counsels [sic] to write in to the court at least three days before the hearing applying for a postponement. By doing so the counsel may be able to know whether the application for postponement is going to be granted or not. If the court does not respond then the counsel must assume that the application is not granted and be ready for the hearing.

In the case before us there was no letter sent by the appellant to the court asking for any postponement. The application for postponement was only made orally by Cik D. Nair on the day of hearing when the case was called. Nonetheless we heard the merits of her application. *An application for a postponement made at the commencement of the hearing of any case can only be granted if the following two conditions are satisfied. Firstly there are valid and reasonable grounds for the postponement; and secondly the applicant must explain why the court had not been informed of the application before the date of hearing.* In this case Cik D. Nair was unable to give any valid and reasonable ground for the postponement. She could not satisfactorily explain why Encik Nik Saghir who was supposed to handle this case could not appear in court this morning. Nor did she give any reason why no letter had been written to court before the date of hearing applying for a postponement. *We consider it very important for any party applying for a postponement to inform the court in advance that he is seeking a postponement and giving his reason. By so doing the court can consider it and if the reasons are valid would grant a postponement and at the same time fix another case for hearing so that the Court's time could be utilised to hear another case.* In this case the notice for hearing had been issued on 15 August 1997 and the hearing was fixed on 28 August 1997. In the light of the fact that the counsel for the appellant was unable to furnish satisfactory reasons for the postponement we consider it highly improper for us to exercise our discretion to grant any postponement.

(emphasis added); and

(d) PS Gill J's (as His Lordship then was) decision in the High Court case of *OCBC Bank (M) Bhd v. CTK Enterprise Sdn Bhd* [2000] 6 CLJ 158 at p. 161; [2000] 6 MLJ 372, at p. 376, as follows:

> On the issue of adjournment, I must say with deep regret that there is a growing tendency of counsels *[sic]* appearing in court, but not ready to proceed with the hearing of the case. It would seem that Mr Pritam Singh in this case appeared in court with the idea that he would get a postponement as a matter of right. It is most presumptuous to pre-empt the decision of the court. *When a case is fixed for hearing the counsel who appears in court must ensure that he is ready to proceed for hearing, even though the counsel intends to apply for a postponement, because granting of a postponement is at the discretion of the court. Granting of adjournments on the slightest pretext bedevils the administration of justice, and thus should be exercised only sparingly.*
>
> *In exercising this discretion the court will consider the merits of the application. The court will only grant a postponement if reasons given are satisfactory.* In this instance I was informed that Mr Bachan Singh, the counsel having conduct of this matter was engaged in a magistrates' court case in Kuala Lumpur. It is beyond me that a counsel would choose to give priority to a magistrates' court hearing as opposed to a High Court hearing. Even if the magistrates' court hearing was one of particular importance, it behoves on the counsel to make necessary arrangements for someone else from his firm to not only appear but be ready to proceed on the matter.
>
> *It would be prudent for counsels [sic] who wish to seek adjournments to write in to court at least three days before the hearing to apply for a postponement. By doing so counsel may be able to know whether the application for postponement has been granted or not. If the court does not respond, counsel must then assume that the application for postponement is not granted and to be ready for the hearing, Abdul Mutalib Dato' Seri Razak v. The Malaysian Bar & Anor* [1998] 2 CLJ 751.
>
> *If an application for postponement is made at the outset of the hearing, then counsel should proffer valid grounds for the postponement and also explain to the court why the court had not been informed of the application for adjournment before the date of hearing.* Mr Pritam Singh had failed on all accounts to satisfy me as to why I should grant the adjournment. I thus disallowed his request for adjournment and proceeded to hear the matter.
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> (emphasis added)

[23] It is to be noted that whether the court exercises its discretion to adjourn a hearing of a matter, is dependent on the particular facts of the case in question. Accordingly, reported cases on whether adjournments are allowed or otherwise, do not constitute binding legal precedents from the

view point of the *stare decisis* doctrine – please see Mahadev Shankar JCA's judgment in the Court of Appeal case of *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300, at p. 306.

[24] This court did not exercise its discretion to adjourn the hearing of the defendant's application and OS under O. 32 r. 4(1) and O. 28 r. 5 RC respectively for the following reasons:

(a) based on *Lee Ah Tee*, due to reasons elaborated subsequently in this judgment, there was no injustice to the plaintiff if there was no adjournment of the hearing of the defendant's application and OS;

(b) the plaintiff's learned counsel did not inform this court of any need to reply to the defendant's first and second affidavits. There was no averment of fact in the defendant's first and second affidavits which required a reply from the plaintiff. For reasons stated later in this judgment, the defendant's application and the OS were not decided by this court on the failure of the plaintiff to reply to the defendant's first and second affidavits. In deciding the defendant's application and OS, this court did not draw any adverse inference against the plaintiff for failing to reply to the defendant's first and second affidavits. In other words, the plaintiff's failure to file the plaintiff's second affidavit, had not prejudiced the plaintiff in any manner in this case;

(c) written submissions are not mandatorily required under RC. Although the plaintiff was not given time to file the plaintiff's written submission, this court had allowed the plaintiff's learned counsel to submit orally in respect of both the defendant's application and OS;

(d) for reasons given later in this judgment, based on *Harold Shaw*, I do not see how the plaintiff's second affidavit and plaintiff's written submission would assist this court to decide the defendant's application and OS;

(e) the court's directions in respect of the filing of the plaintiff's second affidavit and plaintiff's written submission, have not been complied with by the plaintiff (plaintiff's breach of court's directions). With the introduction of RC and the application of O. 28 r. 4(2) RC in this case, directions are given by the court to ensure a just, expeditious and economical disposal of the defendant's application and OS. To adjourn the hearing of the defendant's application and OS, is contrary to an expeditious and economical disposal of those matters as required by O. 28 r. 4(2) RC;

(f) no reason had been given for the plaintiff's breach of court's directions; and

(g) before the hearing of the defendant's application and OS, the plaintiff's learned solicitor did not make any prior application for extension of time to file the plaintiff's second affidavit and plaintiff's written

submission. Nor did the plaintiff's learned solicitor apply at least three days in advance for a postponement of the hearing of the defendant's application and OS (as required by *Abdul Mutalib* and *OCBC Bank (M) Bhd*). Regrettably, the plaintiff's learned counsel only made an oral application to adjourn the defendant's application and OS on the hearing date of both matters!

Relevant Statutory Provisions

[25] Section 42 AA provides as follows:

Reference on questions of law

s 42(1) **Any party may refer to the High Court any question of law arising out of an award**.

(1A) *The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties*.

(2) *A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought*.

(3) *The High Court may order the arbitral tribunal to state the reasons for its award where the award*:

(a) *does not contain the arbitral tribunal's reasons; or*

(b) *does not set out the arbitral tribunal's reasons in sufficient detail.*

(4) *The High Court may, on the determination of a reference:*

(a) *confirm the award;*

(b) *vary the award;*

(c) *remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or*

(d) *set aside the award, in whole or in part.*

(5) Where the award is varied by the High Court, the variation shall have effect as part of the arbitral tribunal's award.

(6) Where the award is remitted in whole or in part for reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within ninety days of the date of the order for remission or such other period as the High Court may direct.

(7) Where the High Court makes an order under subsection (3), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from that order.

(8) *On a reference under subsection (1) the High Court may:*

(a) *order the applicant to provide security for costs; or*

(b) *order that any money payable under the award shall be brought into the High Court or otherwise secured pending the determination of the reference.*

(emphasis added).

[26] Sections 66 to 70 of United Kingdom's Arbitration Act 1996 (1996 AA) state as follows:

67. **Challenging the award: substantive jurisdiction**

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court:

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order:

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

68. **Challenging the award: serious irregularity**

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant:

A (a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

B (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

C (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

D (h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers

E in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may:

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

F

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied

G that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

69. **Appeal on point of law**

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(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

I An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except:

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied:

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award:

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order:

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court

which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

70. **Challenge or appeal: supplementary provisions**

(1) **The following provisions apply to an application or appeal under section 67, 68 or 69.**

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted:

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award:

(a) does not contain the tribunal's reasons, or

(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,

the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(6) *The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.*

The power to order security for costs shall not be exercised on the ground that the applicant or appellant is:

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(7) *The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.*

(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7). This does not affect the general discretion of the court to grant leave subject to conditions.

(emphasis added).

Whether Defendant's Application Should Be Allowed?

[27] The defendant's first affidavit alleged the following, among others, in support of the defendant's application:

(a) the defendant's then solicitors, Messrs Lau & Associates, have sent a letter dated 30 January 2015 to the plaintiff's solicitors (defendant's letter dated 30 January 2015), demanding the plaintiff to pay the sum due under the award (until 30 January 2015) within 14 days from the date of the defendant's letter dated 30 January 2015, failing which the defendant would proceed with execution to recover the sum due under the award. The plaintiff's solicitors did not reply to the defendant's letter dated 30 January 2015. Nor did the plaintiff pay the sum due under the award to the defendant;

(b) the plaintiff's registered address and address for service as stated in the plaintiff's first affidavit are different from the plaintiff's registered address and business address in the records of the Companies Commission of Malaysia (SSM's records); and

(c) based on SSM's records, the plaintiff has not filed "Summary of Financial Information" after the financial year ending 30 June 2011 (2011 financial year). For 2011 financial year, the plaintiff has only made a profit of RM24,072. The defendant therefore contends that if the OS is dismissed, there is a possibility that the plaintiff cannot pay costs for the dismissal of the OS to the defendant.

[28] I am not able to find any Malaysian case which has construed s. 42(8)(b) AA. Neither the plaintiff nor the defendant has cited any case, local or otherwise, in respect of the defendant's application. It is to be noted that s. 42(8)(b) AA is similar to s. 37(7) AA which empowers the court to order payment into court of any sum of money payable in an award or to "secure" such a sum pending the determination of an application to set aside the award under s. 37(1) AA. My research has not revealed any Malaysian case which has decided s. 37(7) AA.

[29] Section 70(7) of the 1996 AA is similar (not identical) to our s. 42(8)(b) AA. As such, I shall refer to English cases on the interpretation of s. 70(7) of the 1996 AA.

[30] My reading of English cases seems to indicate that there are two different views on the application of s. 70(7) of the 1996 AA.

[31] According to the first view on the construction of s. 70(7) of the 1996 AA (first view), if there is a challenge of the arbitral tribunal's jurisdiction under s. 67 of the 1996 Act, an applicant must satisfy a threshold requirement, namely the applicant must satisfy the court that the challenge to the arbitral tribunal's jurisdiction is "flimsy or otherwise lacks substance". The first view is laid down in the following English High Court decisions:

(a) Tomlinson J's (as His Lordship then was) judgment in *Peterson Farms Inc v. C & M Farming Ltd* [2004] 1 Lloyd's Rep 614, at paras. 35-36, as follows:

> 35. *It seems to me that, in most cases, it is likely that demonstration by the party against whom the jurisdictional challenge is made that the challenge is flimsy or otherwise lacks substance is likely to be regarded as a threshold requirement for the court's consideration whether in all the circumstances it is appropriate to require, as a condition of proceeding under section 67, that money payable under the award shall be brought into court or otherwise secured pending the determination of the application. That being the case, the threshold is not, in this case, crossed by C & M, and I would, for that reason alone, decline to grant the relief sought.* I would, however, go further, which is to indicate that in the circumstances of this case, having regard to the evidence which has been placed before me, I would in any event not regard it as an appropriate exercise of my discretion to make an order which, on the basis of the evidence, partially unsatisfactory though it may be, would have the effect of requiring Mr Peterson himself to put up security in relation to the liability of the company Peterson Farms Inc. *Particularly is that so in circumstances where C & M has itself initiated enforcement proceedings in the United States, which, if they are successful, will in any event enable that company to proceed immediately to enforce the entirety of the award without regard to the pending section 67 application.* As I understand it, as recently as 28th August the Arkansas court heard C & M's motion to confirm, which included a hearing of Peterson's stay application pending the section 67 challenge, and in relation to which the Arkansas court has reserved judgment. If C & M are wholly successful in their arguments in that application, they will be in a position to proceed to enforce the award against such assets as they are able to find. So far as concerns the assets which are the subject of the *lis pendens*, i.e. the assets in relation to which Mr Peterson has filed a financing statement and a mortgage, Mr Peterson is, in any event, now precluded by the *lis pendens* from raising further sums on the security of those assets.
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> 36. *All of those factors, as it seems to me, militate against exercising my discretion to require the posting of security in this jurisdiction as a condition for the making of a challenge to the jurisdiction, which is brought both as of right by Peterson and at an appropriate stage in the proceedings, and upon grounds which I do not regard as lacking substance. For all those reasons, therefore, I decline to make the order sought.*

(emphasis added); and

(b) *Peterson Farms Inc* has been followed in the following decisions:

(i) by Flaux J in *A v. B (Arbitration: Security)* [2011] 1 Lloyd's Rep 363, at paras. 11-19, 32 and 50; and

(ii) by Eder J in *Konkola Copper Mines plc v. U & M Mining Zambia Ltd* [2014] 2 Lloyd's Rep 507, at para. 44.

[32] Morison J in the English High Court case of *Tajik Aluminium Plant v. Hydro Aluminium AS* [2006] EWHC 1135, declined to follow *Peterson Farms Inc*. In *Tajik Aluminium Plan*t, at paras. 53 and 55, Morison J decided as follows (second view):

> 54. *I take a slightly different view of the power to order security under section 70(7) from that taken by Tomlinson J (in Peterson Farms Inc).* It seems to me that this question is indirectly linked to the other main issue. In my judgment it is not mere happenstance whether a jurisdiction case arises under section 30-32 or section 72, in the sense used in the judgment. As I have already tried to explain, there is a difference between a Tribunal making an award on the merits and jurisdiction which gives rise to an unfettered right to make a section 67 application, and other cases where there has been no trial by consent of the parties of all the issues in the case. The parties will choose to follow the most convenient and acceptable course. In this case, it would have been open to the parties to agree that the Court should deal with the jurisdiction issues. But in this case, because of the overlap between the facts and the jurisdiction arguments, that would have meant that their chosen method of dispute resolution would have been taken away. For good reason, and not chance, the parties chose, instead, that the Tribunal should decide these matters. It is not surprising, therefore, that Parliament should have confined section 70(7) to those jurisdiction cases where the parties had elected to have the Tribunal produce an Award after determining the facts and their impact on jurisdiction. The position is different when either there has been a one sided trial by a Tribunal, or where 'merely' preliminary jurisdiction issues are determined. The fact that section 70(7) does not apply in all circumstances says nothing about whether it should apply in the present case, indeed, it provides some support for the view which I take of it.
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> 55. **The statute contains an unfettered discretion. There is no threshold requirement**.

(emphasis added).

[33] I am inclined to follow the second view. In my opinion, there is no threshold requirement to be fulfilled under s. 42(8)(b) AA. This is due to the following reasons:

(a) there is nothing in s. 42(8)(b) AA which imposes a threshold requirement on the exercise of the court's discretionary power under that provision; and

(b) the first view may be justified on the wording of s. 67 of the 1996 AA which provides that a party to an arbitral proceedings may apply to the English High Court to challenge an award in respect of the arbitral tribunal's substantive jurisdiction. Our AA has no provision which is equivalent to s. 67 of the 1996 AA.

[34] English cases have decided that before a court exercises its discretion under s. 70(7) of the 1996 AA to order money payable in an award to be paid into court or to be "otherwise secured", the party which has applied under s. 70(7) of the 1996 Act (applicant) must show that the respondent's challenge to the award, will prejudice the applicant's ability to enforce the award. Such a requirement is explained in the following English cases:

(a) Flaux J decided as follows in *A v. B (Arbitration: Security)*, at paras. 44, 48-50, 56, 60 and 61:

> 44. Mr Collett submitted that in cases where the threshold requirement had been satisfied, that was still only necessary, not sufficient, in determining whether or not it was appropriate to order security under section 70(7) in the case of a jurisdictional challenge under section 67. *He submitted that a key factor in determining whether to order security under section 70(7) generally should be the effect of any challenge to the award on the successful party's ability to enforce the award. This would bring section 70(7) into line with the similar provision in section 103(5) of the Arbitration Act, concerning enforcement.*
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> …
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> 48. *That the issue of whether security should be ordered under section 70(7) should be related to issues of ease or difficulty of enforcement and diminution of assets is apparent from the Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law (1996), headed by Lord Saville, which commented, at para 380, on the clause in the Bill when security was limited to what are now sections 67 and 68 and recommended extending it to what is now section 69, on the basis that the power to order security was a "tool of great value, since it helps to avoid the risk that while the appeal is pending the ability of the losing party to honour the award may, by design or otherwise be diminished".*
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> 49. *Furthermore, in the first Peterson Farms case [2004] 1 Lloyd's Rep 614 Tomlinson J regarded it as a material factor militating against the granting of security under section 70(7) that the successful party had initiated enforcement proceedings against Peterson in the United States which would enable it to proceed to enforce the entirety of the award without regard to the pending section 67 application. In my judgment, similar considerations in the present case militate against the grant of security,* for reasons I will come to shortly.
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> 50. *Thus, whilst it would not be advisable or appropriate to lay down hard and fast rules as to the circumstances in which it would be appropriate to order security under section 70(7), it seems to me that as a general principle the court should not order security unless the applicant can demonstrate that the*

challenge to the award (whether under section 67 or, indeed, either of the other sections) will prejudice its ability to enforce the award. Often this will entail the applicant demonstrating some risk of dissipation of assets, although there may be other ways in which enforcement could be prejudiced.

…

56. *Accordingly, in my judgment, there is no evidence whatsoever that the challenge to the jurisdiction under section 67 will prejudice enforcement by B and, in those circumstances, it is not appropriate to order security under section 70(7).*

…

60. *At all events, the cases in which it would still be appropriate to require security to be provided are likely to be limited to those cases where the appeal under section 69 will prejudice enforcement.* Even then, given that permission to appeal will only be granted if the court considers that the award is obviously wrong or, in cases of general public importance, at least open to serious doubt, it might be thought that the difficulties which an appeal might pose for enforcement of such an arguably "flawed" award should not, in itself, justify a requirement to provide security.

61. *It seems to me that it would only be in cases where the appeal might potentially be used as a delaying tactic and, in the meantime, assets otherwise available to satisfy the award might be dissipated that the court might consider making an order under section 70(7),* notwithstanding that it had formed the view that in principle permission to appeal should be granted. However, quite apart from the fact that the issue of whether permission to appeal should be granted will be for another judge on a later occasion (and, as I indicated at the hearing, it seems to me the issue of permission under section 69 should be dealt with at the same time as the challenge to jurisdiction under section 67), there is no evidence before the court to suggest that the section 69 application is being used as a delaying tactic whilst assets are diverted. On the contrary, the evidence is that enforcement in Kazakhstan can proceed and there is no evidence of any intention to dissipate assets.

(emphasis added); and

(b) *Konkola Copper Mines plc*, at para. 48.

[35] In construing s. 42(8)(b) AA, I accept *A v. B (Arbitration: Security) and Konkola Copper Mines plc* – for the court to order money payable in an award to be paid into court or to be "otherwise secured" under s. 42(8)(b) AA, the applicant should satisfy the court that there will be prejudice to the applicant's ability to enforce the award under s. 38 AA. Section 38 AA provides for the recognition and enforcement of the award by a successful party in the arbitration, namely the applicant. My view is premised on the following reasons:

A (a) a party who is successful in an arbitration, has the right to enforce the award under s 38 AA. If the award can be enforced under s. 38 AA, there is no need to apply under s. 42(8)(b) AA. The need to file an application pursuant to s. 42(8)(b) AA only arises when there may be prejudice to the applicant's right to enforce the award under s. 38 AA, such as dissipation of assets by the "losing" party in the arbitration (who is also the plaintiff who has filed the court reference) so as to defeat any enforcement of the award by the applicant; and

(b) the above interpretation will ensure that a court reference is disposed of expeditiously without being unnecessarily delayed by an application under s. 42(8)(b) AA.

[36] Before I turn to the merits of the defendant's application, there are two other matters which I will adopt English cases in deciding an application under s. 42(8)(b) AA:

D (a) if there is a "real risk" that a party who has filed a court reference is not able to satisfy any order of costs if the court reference is subsequently dismissed, the party resisting the court reference should apply for security for costs under s. 42(8)(a) AA and not resort to s. 42(8)(b) AA – *Konkola Copper Mines plc*, at paras. 26, 27 and 31; and

E (b) s. 42(8)(b) AA only applies when the award has specified a sum of money to be payable. I rely on Field J's judgment in the English High Court case of *Moondance Maritime Enterprises SA v. Carbofer Maritime Trading APS* [2013] 1 Lloyd's Rep 269, at para. 9:

> *In my judgment, s. 70 (7) is predicated on there having been a specific sum of money ordered to be paid under the award appealed or challenged and Mr MacDonald's* (learned counsel for party resisting application under s. 70(7) of the 1996 Act) *submission is correct. Accordingly, since CMT's costs have not been assessed, its first application fails.*

(emphasis added).

G **[37]** It is my considered view that the defendant's application should be dismissed for the following reasons:

(a) there is no evidence that there will be any prejudice to the defendant's right to enforce the award under s. 38 AA. In fact, the defendant's letter dated 30 January 2015 had stated clearly that if the plaintiff failed to pay the sum due under the award (as of 30 January 2015) within 14 days from the date of the defendant's letter dated 30 January 2015, the defendant would proceed to enforce the award;

(b) the fact that the plaintiff's registered and address for service in the plaintiff's first affidavit are different from the plaintiff's registered and business addresses in SSM's records, does not show any risk of dissipation of assets by the plaintiff so as to defeat the defendant's

enforcement of the award under s. 38 AA. Similarly, the plaintiff's failure to file with SSM its financial information after the 2011 financial year, does not prove any prejudice to the defendant's right to enforce the award under s. 38 AA. In fact, the defendant has yet to apply to the High Court to recognise and enforce the award as a judgment under s. 38(1) AA; and

(c) the fact that the plaintiff has only made a profit of RM24,072 for 2011 financial year, may show a "real risk" that the plaintiff may be unable to pay costs of the OS if the OS is subsequently dismissed. Such a risk only justifies an application for security for costs under s. 42(8)(a) AA and not an application under s. 42(8)(b) AA.

[38] As the defendant's application was doomed to fail (for reasons stated above), I did not allow the oral application of the plaintiff's learned counsel to adjourn the hearing of the defendant's application so as to enable the plaintiff to file the plaintiff's second affidavit and plaintiff's written submission.

[39] Despite dismissing the defendant's application, I did not order any costs to be paid by the defendant to the plaintiff for the defendant's application. This was because I exercised my discretion under O. 59 r. 21 RC not to order any costs in respect of the defendant's application as the plaintiff had not filed any affidavit and written submission to oppose the defendant's application.

Has Plaintiff Lost Its Right To Make Court Reference By Agreeing To Arbitration Clause?

[40] In the defendant's written submission, the defendant submitted that by reason of the arbitration clause (which has provided that the award "shall be final and binding on both parties"), the plaintiff had lost its right under s. 42 AA to file the court reference. Reliance was placed on the following High Court's judgment in *Antara Steel Mills Sdn Bhd v. CIMB Insurance Brokers Sdn Bhd* [2014] 5 CLJ 707, at pp. 723-724:

The Plaintiff's Position In The Arbitration Proceedings

[41] *The next point taken by the defendant was that it was not liable for the losses suffered by the plaintiff based on the decision of the plaintiff to agree with the insurers, at the commencement of the arbitration proceedings, that the decision of the arbitral tribunal shall be final, binding and non-appealable.* It is argued that the plaintiff has only itself to blame for its present predicament. It had lacked reasonable foresight in agreeing with the insurers to accept that the decision of the arbitrator shall be final and unappealable. *By virtue of this agreement, it has now lost its right under ss. 37 and 42 of the Arbitration Act 2005 to challenge the award of the arbitral tribunal in refusing rectification of the IAR 2005 Policy.* The defendant argued the plaintiff has suffered the losses claimed in this action, because of the aforesaid agreement and not because of its breach of its duty to the plaintiff.

A [42] *There is, undoubtedly, considerable force in this argument. It is true that the plaintiff by agreeing to accept that the decision of the arbitral tribunal as final and non-appealable, has precluded itself from challenging the correctness of the said decision in regard to the plaintiff's right to apply for rectification.*

(emphasis added).

B **[41]** I do not accept the above contention as the Court of Appeal has recently reversed the above High Court's judgment in *Antara Steel Mills Sdn Bhd v. CIMB Insurance Brokers Sdn Bhd* [2015] 5 CLJ 1018. Mohd Hishamudin Yunus JCA decided as follows in *Antara Steel Mills Sdn Bhd*, at pp. 1024-1025:

C [18] In our judgment, with respect, there is no merit in the defendant's argument which raises the issue of causation in regard to the financial loss suffered by the plaintiff. In the first place, *there is a misconception here on the part of the defendant as well as on the part of the learned Judicial Commissioner that the decision of the arbitral tribunal is*
D *appealable. Under the Arbitration Act, there is no right of appeal against the decision of the arbitral tribunal. The decision of the arbitral tribunal is final, binding and unappealable.* Section 36 [AA] provides:

An award is final and binding

36(1) An award made by an arbitral tribunal pursuant to an
E arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.

(2) The arbitral tribunal shall not vary, amend, correct, review,
F add to or revoke an award which has been made except as specifically provided for in section 35.

[19] *Thus, there is nothing creative or innovative on the part of the parties when they entered into an agreement at the commencement of the arbitration proceedings to state that the award of the arbitral tribunal is final, binding and unappealable. The parties are just restating what is already provided*
G *for in s. 36 [AA]. In fact this agreement to preclude the right of appeal by the parties is superfluous. In Pembinaan LCL Sdn Bhd v. SKStyrofoam (M) Sdn Bhd* [2007] 3 CLJ 185; [2007] 4 MLJ 113 Gopal Sri Ram JCA (as he then was) in delivering the unanimous judgment of the Court of Appeal explained the effect of s. 36 [AA] in the
H following terms:

[14] It is the unanimous view of all the authorities that the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction. See, for example, *Puri Construction Pvt Ltd v. Union of India* AIR 1989 SC 777, where it was held that:

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> ... a court while examining the objections taken to an award filed by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials.
>
> [15] I have read and re-read the judgment under appeal. From the language employed in the learned judge's judgment it may be readily gathered that he was treating the application before him as though it were an appeal.
>
> (See also the decision of this court in *Awangku Dewa Pgn Momin & Ors v. Superintendent of Lands and Surveys, Limbang Division* [2015] 3 CLJ 1.)
>
> [20] We do, however, note that the learned Judicial Commissioner has in her grounds of judgment cited ss. 37 and 42 of the Arbitration Act as if these provisions provide for an appeal against the award of the arbitral tribunal. We do not propose to labour on these provisions. *It is sufficient for us just to state here that the learned Judicial Commissioner, with respect, was mistaken in her grounds of judgment: these provisions do not provide for an appeal against the award of an arbitral tribunal. Section 37 merely provides for an application to the High Court by an aggrieved party to set aside the award of an arbitral tribunal in the limited circumstances as specified by the section. And s. 42 merely provides for referral on a question of law to the High Court. For the sake of completeness, we just wish to add that in any event, in the present case, the defendant did not plead in its statement of defence that the plaintiff had entered into an agreement with the insurer not to invoke either s. 37 or s. 42 [AA]; or that, based on the facts and the law (which the defendant must explain in its pleading), the plaintiff could have successfully invoked before the High Court (but failed to do so) either s. 37 or s. 42 [AA] to impugn the arbitral award.*
>
> (emphasis added).

Court Reference Under s. 42 AA And O. 69 RC

[42] The following provisions of O. 69 rr. 2, 4 and 6 RC are relevant to a court reference:

> Order 69 rule 2 Claims under the [AA]
>
> 2(1) **In this Order, "arbitration claim" means any application to the Court under the 2005 Act, including a claim to:**
>
> …
>
> **(h) determine under section 42 of the 2005 Act, any question of law arising out of an award;**
>
> …
>
> (3) **An application under subparagraph (1)(b), (c), (g), (h), (i) or (m) shall be served on each arbitrator.**

A Order 69 rule 4 Starting the claim

4(1) **An arbitration claim under rule 2** or rule 3 may be made using the originating summons procedure, and Form 5 shall be filed in the High Court. **An arbitration claim originating summons shall:**

(a) **include a concise statement of:**

B (i) the remedy claimed; and

(ii) **any question on which the applicant seeks the decision of the Court;**

…

C (4) **Where relevant, rules 5 to 8 shall additionally apply.**

Order 69 rule 6 **Application to refer questions of law arising out of an award**

6(1) *A reference of any question of law to the Court under section 42 of the 2005* D *Act may be made at any time within forty-two days of the publication and receipt of the award.*

(2) *In every application for reference of a question of law under section 42 of the 2005 Act the originating summons shall, in addition to the matters stated in rule 4(1):*

E (a) *identify the question of law arising out of the award which is sought to be determined;*

(b) *state the grounds on which reference is sought; and*

(c) *give particulars of each ground on which it is contended that the arbitral tribunal erred in law, with references to the paragraphs or passages of* F *the award where each alleged error is to be found.*

…

(4) *The originating summons and affidavit shall be served on each arbitrator and the respondents.*

G (emphasis added).

[43] Before deciding on the merits of the OS, it is pertinent to state my understanding of s. 42 AA read with O. 69 rr. 2, 4 and 6 RC and the relevant case law.

H **[44]** Firstly, I remind myself that a court reference is not an appeal to the High Court against an award. As provided in s. 36(1) AA, an award is final. The Court of Appeal in *Antara Steel Mills Sdn Bhd* has already stated that there is no appeal to the High Court against an award. In *Awangku Dewa Pgn Momin & Ors v. Superintendent of Lands and Surveys, Limbang Division* [2015] 3 CLJ 1, at 10, 13 and 15 (*Awangku Dewa*), Mohd Hishamudin I Yunus JCA decided as follows in the Court of Appeal:

There Is No Appeal Against The Decision Of An Arbitral Tribunal A

[12] *There is a basic and important legislative policy codified in our Arbitration Act 2005, and that policy is that the award of an arbitrator is final and binding. There is no recourse to a court of law by way of an appeal. This is clearly stated by s. 36 [AA] …*

Exceptions To The Policy B

[13] **However, the [AA] provides for some but limited exceptions where an award of the arbitrator may be challenged in a court of law**. A party to an arbitration proceedings aggrieved by an award may apply to a High Court to set aside the award under s. 37 [AA]. But he may do so only in the limited circumstances as specified by C that section.

[14] *Another exception is that a party to an arbitral proceedings, dissatisfied with the decision of the arbitral tribunal, may refer a question of law to the High Court pursuant to s. 42 [AA] for the court's determination.*

… D

[18] *… It is our observation that, just like the learned High Court Judge, both counsels [sic], in spite of having acknowledged that the proceedings before them is initiated pursuant to s. 42 of the Act, yet appear to treat the proceedings as if it is an 'appeal' and not a reference on questions of law. There is scant regard for the purpose and integrity of s. 42 of the Act that* E *what is permissible under that provision is only to refer purely a question of law to the High Court, and nothing more*

High Courts Have No Appellate Jurisdiction

[19] **On our part, in considering this appeal we remind ourselves what was said in *Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd*** F [2007] 3 CLJ 185; [2007] 4 MLJ 113 by Gopal Sri Ram JCA (as he then was), in delivering the decision of the Court of Appeal (at p. 204 (CLJ); p. 124, para. [14] (MLJ)):

[14] *It is the unanimous view of all the authorities that the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does* G *not enjoy appellate jurisdiction.*

…

[22] *In our judgment the eight 'questions of law' referred to the High Court are not genuine questions of law but rather an attempt to appeal against the decision of the arbitrator*. If it had been a genuine move to refer H questions of law to the High Court, then, the questions of law would have been concisely and clearly framed; and the questions posed need not have to be as many as eight. Instead, what we find in the originating summons, are not concisely and clearly framed questions of law, but rather criticisms of the decisions of the learned arbitrator drafted in the manner that one normally I finds in the 'grounds' of a memorandum (or petition) of appeal (note the repeated usage of the phrase 'erred in law' in every

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'question' that was posed). *In other words, we find the 'reference' to be an attempt to appeal against the award (which the Act does not allow) but disguised as a 'reference on questions of law' under s. 42.*

…

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[28] *A High Court in dealing with a s. 42 reference must summarily dismiss the application, without even attempting to answer the 'question of law' posed to the court, if the question is, in the first place, not properly and intelligibly framed; or where it is clear to the court that there is a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal. In other words, a court of law must always be vigilant against any attempt by a party to abuse the s. 42 procedure as provided for by the Act and to utilise the provision as a backdoor avenue for appealing against the decision of an arbitral tribunal.*

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(emphasis added).

[45] The second matter which I need to highlight is that s. 42 AA is *sui* D *generis*, namely there is no equivalent of s. 42 AA in the 1996 AA or in the arbitration legislation of other countries. This is stated in the following cases:

(a) the judgment of Mohamad Ariff Yusoff JCA in the Court of Appeal case of *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 E CLJ 617, at 624 (*Perwira Bintang Holdings*), as follows:

> However, s. 42 has no direct equivalent provision in the (UNCITRAL Model Law);

(b) Nallini Pathmanathan J (as Her Ladyship then was) held in the High F Court case of *Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* [2013] 1 LNS 1470; [2014] 1 AMR 253, at p. 260, as follows:

> [5] The [AA] is modelled on UNCITRAL Model Law ("the Model Law"). However, s 42 is one of the few sections that has no parallel in the Model Law. As such, no recourse may be made to the Model Law to ascertain or construe this G section."; and

(c) in *MMC Engineering Group Bhd & Anor v. Wayss & Freytag (Malaysia) Sdn Bhd* [2015] 1 LNS 703; [2015] AMEJ 873, at paras. 16 and 18, Mary Lim Thiam Suan J decided as follows in the High Court:

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> [16] Section 42 [AA] is peculiar to the Malaysian arbitration scene.
>
> …
>
> [18] The recourse of referring questions of law to Court under section 42 is not unusual as other jurisdictions do similarly allow questions of law to be posed but, using an appeals I mechanism. In fact, it would appear that Malaysia is the only jurisdiction that uses this mechanism, and it is in this sense, that I would say that section 42 is peculiar to Malaysia.

[46] Thirdly, an application of s. 42 AA concerns the following three matters:

(a) whether a plaintiff has fulfilled certain threshold requirements under s. 42 AA read with O. 69 rr. 2, 4 and 6 RC so as to confer jurisdiction on the court to determine the question of law referred to it. I will describe this preliminary stage as a "Threshold Stage";

(b) if the threshold stage is resolved in favour of a plaintiff, the court may proceed to answer the question(s) of law referred to it. The court's determination of question(s) of law referred to it, will be described in this judgment as the "Determination Stage"; and

(c) if the question(s) of law is (are) determined against a plaintiff, the OS will consequently be dismissed. If however the court answers the question(s) of law in favour of a plaintiff, the court nevertheless retains a discretion not to grant any relief as provided in s. 42(4)(a) to (b) AA. I will refer to this final stage as the "Relief Stage".

Threshold Stage

[47] In my view, there are at least nine threshold requirements (Nine Threshold Requirements) before the court has jurisdiction to decide a court reference. I say "at least" nine threshold requirements because there may be a tenth threshold requirement which I will discuss later. The nine threshold requirements are as follows:

(1) in accordance with s. 42(2) AA and O. 69 r. 6(1) RC, a court reference should be made within 42 days from the date of publication and receipt of the award (time period for court reference). The time period for court reference is held to be mandatory by Hamid Sultan J (as His Lordship then was) in the High Court case of *Chip Lam Seng Bhd v. R1 International Pte Ltd* [2010] 1 LNS 64, at paras. 1-3, as follows:

> 1. In the instant case the arbitration award was dated 21.04.2009. However *the present application was only made on 05.06.2009 ie, more than 42 days after the arbitration award. Section 42(2) AA 2005 makes it clear that any reference must be made within 42 days.*
>
> …
>
> 2. *It is clear that the present application prima facie is in breach of the mandatory provision of the Act. In addition the applicant had filed this application without seeking leave of court or at least seeking leave in the present application. In addition I will say that as a general rule courts are reluctant to condone delay unless exceptional circumstance warrants it to do so. In Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed* [1997] 3 CLJ 332, the Supreme Court had this to say:
>
> > Generally, statutory provisions in respect of time are always mandatory and obligatory unless an express power to enlarge or abridge time is given to the court therein.

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3. *In the instant case there appears to be no express provision for the applicant under section 42 of AA 2005 to make an application after lapse of 42 days and in consequence the application must be dismissed in limine*.

(emphasis added);

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(2) only a question of law may be referred under s. 42(1) AA and O. 69 r. 6(1) RC. As to what constitutes a "question of law", I refer to the following cases:

(a) the Court of Appeal in *Perwira Bintang Holdings*, at pp. 637-638, has approved Nallini Pathmanathan J's (as Her Ladyship then was) judgment in *Exceljade Sdn Bhd* as follows:

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The Issue Of Recognising What Is A Question Of Law

[58] *It has to be stated and recognised, however, that the issue of what constitutes "a question of law" is a difficult one. Nallini J in Exceljade, supra, has helpfully addressed this vexed issue by drawing on the acute observations of Mustil J in Finelvet AG v. Vinava Shipping Co Ltd, The Chrysalis* [1983] 1 Lloyd's Rep 503; [1983] 1 WLR 1469. We reproduce the useful analysis by Nallini J below:

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> *Mustil J then goes on to consider the proper test or approach to be adopted by a court determining the substantive appeal which turns on a question of law arising out of the arbitration:*
>
> ... Starting therefore with the proposition that the court is concerned to decide on the hearing of the appeal whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages. (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) *The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.* (3) In light of the facts and the law so ascertained, the arbitrator reaches his decision.
>
> In some case, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In some instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.

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Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979 ... (emphasis added)

[59] Mustil J in *The Chrysalis, supra*, was of course referring to the English Arbitration Act 1979 (since amended) where the procedure is that of an "appeal" with leave, but the general principles and guidelines analysed are very relevant for our purposes. *To this extent, we agree with the views expressed in Exceljade, supra, in highlighting the proper approach.*

[60] *In practical terms, we are persuaded that we should be looking at stage (2) of the process of reasoning as the proper focus of the inquiry under s. 42, which will mean ascertaining not so much a clear position of the "law" without regard to underlying facts, but, as analysed, the arbitrator will be ascertaining the "law" as a process comprising "not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached." Typically, this process will involve a mixed consideration of relevant statutory rules, case laws and legal principles, and an identification of the relevant facts on which to apply the "law".*

(emphasis added);

(b) in *SDA Architects v. Metro Millennium Sdn Bhd* [2014] 3 CLJ 632, at 646, Aziah Ali JCA held in the Court of Appeal as follows:

[31] *I am of the view that the first issue that calls for consideration is whether in this case the award of costs by the arbitrator raises a question of law*. The appellant contends that the questions raised by the respondent are not questions of law.

[32] *I am in agreement with the respondent that where it is shown on the face of the award that there has been an apparent failure by the arbitrator to exercise his discretion judicially in the award of costs, then an error of law has occurred which may give rise to a question of law that may be referred to the court under s. 42 [AA]. I find support from the case of President of India v. Jadranska Sobodna Plovidba (supra) which shows that a question of law may be formulated on the basis that an error of law has been occasioned when the arbitrator has failed to exercise his discretion judicially in making an award of costs.*

(emphasis added).

Despite the above judgment by Aziah Ali JCA, Hamid Sultan JCA decided as follows in *SDA Architects*, at pp. 656-658:

(b) *Issue of law ordinarily will relate to substantive rights. It has long been accepted that the issue of costs in relation to court proceeding is at the discretion of the court. … The exercise of discretion per se cannot be posed as a question of law though the litigant may have a*

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right to review the manner the issue of costs was dealt with, ie, whether the right consideration was taken into account, subject to the complainant demonstrating to the court an error in the exercise of discretion has indeed occurred and it is one of the categories appellate interference is warranted. (See *Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858; *Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan* [2002] 3 CLJ 370; [2002] 3 MLJ 155).

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…

(f) … *As the court's role to decide on costs or quantum had been specifically taken away by virtue of ss. 8 and 44 of AA 2005 it is difficult even to fathom how the issue of costs in arbitral proceeding can be framed as a question of law for the determination of the High Court when the statute has specifically deprived the business of the High Court to deal with costs*.

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(emphasis added);

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(c) in *Awangku Dewa*, at p. 15, the Court of Appeal held that s. 42 AA applies only to pure questions of law and not to questions of mixed law and fact;

(d) Nallini Pathmanathan J (as Her Ladyship then was) has followed English cases in *Exceljade Sdn Bhd* to explain that the following matters do not amount to "questions of law" envisaged under s. 42(1):

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(1) an arbitrator's "obvious mistake of fact" which may constitute misconduct on the part of the arbitrator;

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(2) an arbitrator's "obvious mistake of fact" which amounts to an excess of the arbitrator's jurisdiction;

(3) lack of evidence to support an arbitrator's finding of fact; and

(4) inconsistencies in an arbitrator's findings of fact; and

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(e) Mary Lim Thiam Suan J held as follows in *MMC Engineering Group Bhd*, at paras. 26 and 27:

[26] It is the view of this Court that these interpretations and the general principles in sub-clause 5(10) of Schedule 2 of the New Zealand Act are helpful in determining what a question of law is under our section 42.

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[27] *In order for a proper invocation of the Court's powers under section 42, the question of law identified or presented must refer to "a point of law in controversy" which requires the opinion, resolution or determination of this Court. Such opinion or determination can only be arrived at "after opposing views and arguments have been considered". The question will include an error of law that involves an incorrect interpretation of the applicable law but will not include*

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any question as to whether the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; or whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

(emphasis added);

(3) the question of law should arise out of the award (as provided in s. 42(1) AA and O. 69 r. 6(2)(a) RC) and not from the arbitral proceedings – *Perwira Bintang Holdings*, at p. 637;

(4) the question of law should "substantially affects the rights of one or more of the parties" under s. 42(1A) AA – *Perwira Bintang Holdings*, at p. 637. It is to be emphasised that subsection (1A) has been specifically inserted by Parliament by way of Arbitration (Amendment) Act 2011 (Act A1395) (2011 Amendment Act). This requirement is also relevant in respect of the determination stage.

The following cases have explained the phrase "substantially affects the rights of one or more of the parties" in s. 42(1A) AA:

(a) in *SDA Architects*, at p. 647, Aziah Ali JCA decided as follows:

[33] *Section 42 further states that it must also be shown that the question of law substantially affects the rights of one or more of the parties. Learned counsel for the appellant has submitted that the issue of quantum of costs does not affect any legal right of the respondent. However in President of India v. Jadranska Sobodna Plovidba (supra) Hobhouse J said* at p. 279:

> … a question of costs can be categorised as affecting the rights of the parties.
>
> *The rights referred to must include the rights which arise from the award itself*. On this basis, what the applicant for leave has to do is to show that the sum involved in the costs award is sufficiently substantial and depends upon the resolution of the alleged question of law.

Thus a question of costs does affect the rights of the parties and the rights of the respondent are affected since the record of the arbitration proceedings as found in the appeal record shows that costs of this arbitration proceedings will involve a sufficiently substantial sum.

(emphasis added); and

(b) Mary Lim Thiam Suan J followed Singapore cases in *MMC Engineering Group Bhd*, at paras. 38 and 39, in the interpretation of the phrase "substantially affects the rights of one or more of the parties":

[38] Again, there is no definition on this requirement. There is however, some indication of what the term may include in the decision of *Hong Huat Development Co (Pte) Ltd v Hiap*

Hong & Co Pte Ltd [2000] 2 SLR 609. *In that case, the Singapore Court of Appeal accepted the interpretation of expression "substantially affect the rights" by Lord Denning in the Court of Appeal in "The Nema" [1980] QB 547, 564; that it refers to "a point of practical importance – not an academic point – nor a minor point".*

[39] *This decision was followed in Northern Elevator Manufacturing Sdn Bhd v. United Engineers (Singapore) Pte Ltd (supra) where the Court of Appeal recognised that "… The question as to how "substantially" was to be measured, remained. Whether a claim was substantial or not can sometimes be considered in absolute terms. We could arbitrarily say that $10 is insubstantial. There will come a point where one might not be able to declare confidently that the given sum is substantial or otherwise, without considering the context of the claim* … In *The Evimera* [1982] 1 Lloyd's Rep 55, the court was of the view that the claim for $20,000 was not substantial in the context of that case… We agree with the court in *The Evimera* that the granting of leave is a discretionary exercise and as such, is not governed by rules, provided that the statutory criteria are satisfied … The question of substantiality is largely a matter of discretion at case." *I am of the view that this is interpretation holds equally true for section 42 which has the same requirement. I am also of the view that there must be evidence presented or at the very least a claim or an assertion in the cause papers including the affidavits filed in support to the effect that the applicant's rights have been affected substantially by the arbitration award; and an explanation as to how those rights are affected substantially.*

[40] Where this criteria is not met, the Court is obliged to dismiss the reference as subsection 42(1A) uses the term "shall" as opposed to the word "may" which appears elsewhere in section 42. I do not see any element of discretion in this regard, especially since subsection 42(1A) was introduced by way of an amendment in 2011.

(emphasis added);

(5) the question of law should be clearly and sufficiently identified as required by s. 42(2) AA and O. 69 r. 6(2)(a) RC. I refer to two Court of Appeal cases as follows:

(a) in *SDA Architects*, Mohd Hishamudin Yunus JCA, at pp. 639 and 640, held as follows:

[9] *In my judgment, for a proper invocation of s. 42(1) of the Arbitration Act 2005, the question referred to the High Court must be a proper and valid question of law.*

…

[12] *But how does one determine whether a particular question raised is a proper and valid question of law or not? In my judgment, one does so*

by considering the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt with by the arbitrator.

…

[15] *Thus, the respondent/plaintiff should not have framed the proposed question in the manner that it did. It is not only misleading but is also an improper framing of the question, thereby rendering the question invalid.*

(emphasis added); and

(b) Mohd Hishamudin Yunus JCA decided as follows in *Awangku Dewa*, at p. 15:

Guidance For High Courts

[27] *We wish to take the opportunity here to provide the following guidance for the benefit of High Court Judges in dealing with a s. 42 reference. A High Court in considering a s. 42 reference must not take lightly the duty to critically examine the questions posed by the applicant and to ensure that the question referred to the court is purely a question of law and not a question of mixed law and fact, and is clearly and concisely framed, before embarking to entertain the application and to answer the question posed. There should be no complication, confusion or duplicity in framing the questions. Instead, there should be simplicity and clarity. The legal burden is on the applicant to ensure that these requirements are strictly complied with.*

[28] *A High Court in dealing with a s. 42 reference must summarily dismiss the application, without even attempting to answer the 'question of law' posed to the court, if the question is, in the first place, not properly and intelligibly framed; or where it is clear to the court that there is a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal. In other words, a court of law must always be vigilant against any attempt by a party to abuse the s. 42 procedure as provided for by the Act and to utilise the provision as a backdoor avenue for appealing against the decision of an arbitral tribunal.*

[29] Perhaps, to put what we have just said in another way, the High Court must ensure that the question posed by the applicant to the court is a proper and valid question.

(emphasis added).

If the questions of law are not clearly and sufficiently identified as required by s. 42(2) AA and O. 69 r. 6(2)(a) RC and explained by Mohd Hishamudin Yunus JCA in *SDA Architects* and *Awangku Dewa*, I am of the respectful view that a plaintiff may apply to court to amend the OS under O. 20 rr. 5(1), 7 and 8(1) RC so as to identify clearly and sufficiently the questions of law to be determined by the court (amendment application). Order 20 rr. 5(1), 7 and 8(1) RC provide as follows:

A Order 20 rule 5 Amendment of writ or pleading with leave

5(1) Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, *the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct.*

B Order 20 rule 7 Amendment of other originating process

7. Rule 5 shall have effect in relation to an originating summons as it has effect in relation to a writ.

C Order 20 rule 8 *Amendment of certain other documents*

8(1) *For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as* D *to costs or otherwise as may be just and in such manner, if any, as it may direct.*

(2) This rule does not have effect in relation to a judgment or order.

(emphasis added).

E The amendment application is also supported by the following provisions in RC:

(i) Order 1A RC provides that in administering the RC, including O. 69 r. 6(2)(a), the court "shall have regard to the overriding F interest of justice and not only to the technical non-compliance" with RC; and

(ii) Order 2 r. 1(2) RC states that the RC are "subject to the overriding objective of enabling the court to deal with cases justly" and all parties are required to assist the court to achieve this overriding G objective

Needless to say, an amendment application should be dismissed if there is prejudice to a defendant which cannot be compensated in costs;

(6) the question of law should be stated in the OS as provided in O. 69 H rr. 4(1)(a)(ii) and 6(2)(a) RC. Once again, if this requirement is not fulfilled, I am of the opinion that an amendment application is necessary;

(7) the grounds for the court reference (grounds) should be stated in the OS accordance with s. 42(2) AA and O. 69 r. 6(2)(b) RC. In *MMC* I *Engineering Group Bhd*, Mary Lim Thiam Suan J explained as follows, in para. 30:

[30] *The Plaintiffs must furthermore explain the grounds for their grievance, the basis for their claims. Here, the relevant factual findings and legal analysis that form the grounds must be pointed out as the questions of law could not possibly exist on their own, but necessarily emanate from some findings of fact or analysis of the applicable legal principles*.

(emphasis added).

If the grounds are not stated in the OS, in my view, an amendment application should be filed to specify the grounds in the OS;

(8) Order 69 r. 6(2)(c) RC requires the OS to give particulars of each ground for the court reference on which it is contended that the arbitral tribunal has erred in law with reference to the paragraphs or passages in the award which each alleged error of law is to be found (particulars of alleged error of law). *Awangku Dewa*, at pp. 14-15, explains how particulars of alleged error of law should be made:

[24] … *The supporting affidavit should have adopted the same 'questions of law' as set out in the originating summons, and should have proceeded to explain the relevance and significance of each of the 'questions' (in the event the 'questions' are answered in favour of the appellants); and the supporting affidavit should seek to explain why the questions must be answered in favour of the applicants/appellants.*

[25] *Further, the supporting affidavit should set out the complete facts of the case, facts that are necessary or relevant for the purpose of the questions posed*. There should not be any suggestion in the affidavits of parties (but the affidavits, however, do suggest) of facts being disputed or of any disagreement on the part of the applicants/appellants with the evaluation of the evidence by the arbitrator.

(emphasis added).

If the particulars of alleged error of law are not given in the OS, an amendment application is necessary; and

(9) the OS and the supporting affidavit should be served on each of the arbitrators in question according to O. 69 rr. 2(1)(h), (3), 4(4) and 6(4) RC.

If there is no compliance with this requirement, the plaintiff's learned counsel may give an undertaking to serve the OS and supporting affidavit on all the arbitrators and thereafter file an affidavit of service. Additionally or alternatively, such a non-compliance, in my opinion, may be cured under O. 2 r. 1(1) RC and (3) RC because I do not foresee any real or actual prejudice to a defendant by not serving the OS and supporting affidavit on all the arbitrators. Order 2 rr. 1(1) and (3) RC state as follows:

A Order 2

rule 1(1) *Where, in beginning* or purporting to begin *any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been non-compliance with the requirement of these Rules, the non-compliance shall be*
B *treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document,* judgment or order therein.

…

1(3) *The Court or Judge may, on the ground that there has been such*
C *non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules* to allow such amendments, if any, to be made *and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity.*

D (emphasis added).

[48] There is a possible tenth threshold requirement. In *MMC Engineering Group Bhd*, Mary Lim Thiam Suan J held that a plaintiff must show that the questions of law to be determined by the court should not be the same
E as those decided by the arbitral tribunal. It was decided in *MMC Engineering Group Bhd*, in para. 32, as follows:

[32] *In addition, the questions of law now identified for determination of this Court cannot be the same or be re-hatched questions that the parties had already referred to arbitration in the first place. This is apparent from a*
F *reading of subsection 42(2) which is couched in mandatory language requiring the applicant or the Plaintiffs to identify the question of law "to be determined", that is, to be determined by the Court in the present proceedings.* This is regardless of the Court's powers to *inter alia* remit the award in whole or in part, together with the Court's determination on the question of law to the arbitral tribunal for reconsideration*. I do*
G *not believe the question of law can include the specific question that was posed for determination by the arbitral tribunal in the first instance. In that scenario, the question, albeit a question of law, remains one which the Court ought not to intervene and determine. The views expressed in Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 and The Government of India v. Cairns Energy India*
H *Pty Ltd & Anor* [2011] 6 MLJ 441 remain good law in this respect.

(emphasis added).

[49] With respect, I am not in favour of a tenth threshold requirement. My view is premised on the following reasons:

I (a) neither s. 42 AA nor O. 69 RC, expressly or by necessary implication, confines a court reference to a question of law which has not been decided by the arbitral tribunal;

(b) s. 42(1) AA has expressly provided that "any" question of law may be referred to court. The wide meaning of the word "any" in s. 42(1) AA should be given effect. In *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177 at p. 203; [2006] 4 MLJ 113, at pp. 130-131, Augustine Paul FCJ delivered the Federal Court's judgment which gave a wide meaning to the word "any":

> [41] … *Bindra's Interpretation of Statutes* (9th Ed) in commenting on the word 'any' says at p. 1469:
>
> 'Any' is a word which excludes limitation or qualification. It connotes wide generality.
>
> [42] In *Aerlinte Eireann Teoranta v. Canada (Minister of Transport)* [1990] 68 DLR (4th) 220, Heald JA said at p 225:
>
> In summary, then, the appellants' initial submission is to the effect that airlines can only be charged for airport facilities and services which they actually use. I am unable to agree with this submission. *The trial judge carefully examined the language used in s. 5 and concluded that the word 'any' as used in s. 5 should be interpreted to mean 'all', 'each and every' or 'whichever'.* He added (AB vol 19, p 3409): 'Thus 'at any airport' in s. 5 includes among others the meaning 'at each and every, or whichever, airport' at which the Minister provides every and all, or whichever, facilities and services.' I agree with the conclusion of the trial judge.

(emphasis added); and

(c) an arbitral tribunal may have committed a single error of law which has substantially affected the rights of a plaintiff. In such a case, if there exists a tenth threshold requirement and the plaintiff is not able to identify any question of law which has not been decided by the arbitral tribunal, there may be an injustice to the plaintiff because the plaintiff is barred from filing the court reference.

Determination Stage

[50] If a plaintiff has fulfilled all the threshold requirements, the court may then proceed to answer the question(s) of law at the determination stage.

[51] There seems to be two approaches in the determination stage. The first approach (first approach) is to ascertain whether there is any error of law on the face of the award which warrants the court to grant relief to a plaintiff. The first approach is also described as the "patent error of law" test and is illustrated in the following cases:

(a) in *SDA Architects*:

(i) Aziah Ali JCA decided as follows, at p. 648:

> [34] *The next issue to be considered is whether on the face of the award there is an error of law committed by the arbitrator as contended by the respondent.*
>
> …
>
> [36] … *I find that on the face of the award there is no ground to support the respondent's contention that the arbitrator has committed an error of law.*

(emphasis added); and

(ii) Hamid Sultan JCA held as follows, at p. 660:

> [48] Judicial intervention under the old regime pursuant to Arbitration Act 1952 was quite common and threshold to satisfy was much low, as reflected in a number of case laws. The courts took the position that arbitrators must strictly fulfil the requirement of strict judicial and adjudicating process and any omission, misconduct or breach, etc., will entail judicial intervention. *The more recent cases before AA 2005 came into force will demonstrate that courts have already taken cognisance of UNCITRAL model law which advocates minimum intervention and in consequence had increased the threshold for intervention. The court had ruled that the final award of the arbitrator must be viewed in its totality and, any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby justify it to be set aside. (See Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791).*

(emphasis added);

(b) Hamid Sultan J (as His Lordship then was) held as follows in *Chip Lam Seng Bhd*, at para. 3(c):

> It is trite that the court will not ordinarily interfere with the decision of an arbitrator made pursuant to AA 2005 unless it is a case of patent injustice which the law permits the court in clear terms to interfere. I have dealt with this area of jurisprudence in detail in the case of *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporation Sdn Bhd* [2009] 1 LNS 842.

(emphasis added); and

(c) in *MMC Engineering Group Bhd*, at paras. 52-57, 62 and 64-65, Mary Lim Thiam Suan J decided as follows:

> [52] *In any case, there is still room left for the continued application of the error of law on the face of the award test. The test has its roots under common law. The preponderance of the test led to deliberate legislative intervention in other jurisdictions while that is not the case here. I do not find any express statutory provision excluding that test quite unlike the*

position in the United Kingdom. For example, in the UK 1979 Arbitration Act, section 1 deals with "judicial review of arbitration awards", and subsection 1(1) expressly states:

> 1(1) In the Arbitration Act 1950 (in this Act referred to as "the principal Act") section 21 (statement of case for a decision of the High Court) shall cease to have effect and, without prejudice to the right of appeal conferred by subsection (2) below, the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

[53] This statutory policy is maintained in the UK 1996 Arbitration Act in subsection 81(2) which reads as follow:

> 81(2) Nothing in this Act shall be construed as reviving any jurisdiction of the Court to set aside or remit an award on the ground of errors of fact or law on the face of the award.

[54] *There are no comparable provisions in our Act 646 that either mirrors or comes close to the clear express language of subsection 1(1) in the 1979 Act or subsection 81(2) in the 1996 Act. I do not believe there is any room for making any necessary inference either. Although this Court may be prepared to bring this area of law alongside the mainstream approaches under Model Law, I am reminded that the Courts are only interpreters and not legislators of the law. Even in the case of the United Kingdom, the Court's practice and approach changed because of legislative intervention.*

[55] *The positions in New Zealand and Singapore are also different from our section 42.* In New Zealand, the appeals procedure on a question of law arising from an award requires leave to be first procured before the appeal can properly be heard. Leave, however, is unnecessary under Clause 5 of Schedule 2 of New Zealand's 1996 Arbitration Act where the parties have consensually agreed, either before or after the making of the award, to this right of appeal.

[56] *Again, Act 646 does not have similar provisions nor can it be suggested that there is such intent from reading Act 646 as a whole. As expressed earlier, there is no express provision on the removal of jurisdiction and power on ground of error of law on the face of the award.*

[57] Be that as it may, the fact that the test is one of error on the face of the Award does not in the least mean that the challenge is one under public law or that public law concepts of jurisdiction or errors of law are imported into what is nothing else but a private law matter concerning two contracting parties and their contractual dispute. Far from it; and one cannot be distracted by the simple use of the term "error of law".

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[62] Section 49 of the Arbitration Act of 2001 in Singapore is similar to section 81 of the UK Arbitration Act 2005 [should be 1996]. It allows leave only where *inter alia* the Court is satisfied that the question before the Court is one which the arbitral tribunal was asked to determine. Then, on the basis of the arbitral tribunal's finding facts in the award, the decision of the arbitral tribunal on the question is obviously wrong; or the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine that question.

[64] Regardless, the conditions under Singapore's section 49 allow for the reasoning tests propounded in *The Chrysalis. It is furthermore important to observe that like the United Kingdom, Singapore has also removed the common law test of intervention on the existence of an error on the face of the award in 1980 through subsection 18(1) of the Arbitration Act of 2001.*

[65] *All this brings me to the conclusion that the statutory positions in these other jurisdictions are materially different from the Malaysian context. While I am more than prepared to subscribe to consistency and uniformity in arbitrations, the fact that Parliament must have been aware of the prevailing practice and procedure in other legislations at the time Act 646 was enacted, it has nevertheless seen fit not to follow those other regimes is telling and the intention of Parliament must be heeded. I do not believe the amendment in subsection (1A) is sufficient to introduce and adopt the jurisprudence of other jurisdictions which apply an appeal and leave mechanism, especially wholesale. This amendment is vastly different from section 81 of the UK Act of 1996 and subsection 18(1) and section 49 of Singapore's Arbitration Act of 2001.*

(emphasis added).

G **[52]** A different approach applicable in the determination stage concerns an analysis of the reasons for the award – whether the reasons for the award contains an error of law which substantially affects the rights of the plaintiff and which warrants court intervention (second approach). The second approach is also known as the "process of reasoning" test. The following cases have adopted the second approach:

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(a) Mohd Ariff Yusof JCA in the Court of Appeal case of *Perwira Bintang Holdings*, at pp. 633-634 and 636, has approved Nallini Pathmanathan J's (as Her Ladyship then was) judgment in *Exceljade Sdn Bhd* as follows:

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The Developing Case Law

[46] *We have considered the several cases, which have been decided by our courts on the approach to be taken, and the meaning to be ascribed to s. 42.* Both parties have referred to an earlier decision of the

High Court in *Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd* [2009] 1 LNS 1766; [2011] 3 AMR 315 (over which I presided). I then had occasion to offer the following view:

> In my view, the emphasis on the words "arising out of an award" is a pertinent one. A question of law must arise out of an award, and not out of the arbitration. As such, the jurisdiction conferred on the court should be a limited one, more in line with the jurisprudence on error of law on the face of the award.

[47] In the subsequent case of *Maimunah Deraman v. Majlis Perbandaran Kemaman* [2011] 9 CLJ 689, parties had agreed that the same jurisprudence should apply. In *Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd* [2013] 8 CLJ 655; [2013] 5 MLJ 98, a similar sentiment was echoed.

[48] *In this appeal too, counsel for the respondent agrees likewise. Counsel for the appellant, however, has also referred to the more recent decision of the High Court in Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd (OS No: 24NCC(ARB)-3-01/2013), where a less limited view of the provision has been proffered. Nallini J (now JCA) was of the view that the test under s. 24 of the Arbitration Act 1952 (the "error of law on the face of the award" test) should not be extended to s. 42 of the present Act. Nallini J held:*

> *Under the previous section 24 of the repealed Arbitration Act 1952, the test for setting aside awards under the section was whether an error of law on the face of the record arose ... That section being repealed, it would follow that the test previously applied in respect of the repealed section 24 ought not logically be extended or utilised in respect of the new section 42 of the Arbitration Act 2005.* (paragraph 51 of the Judgment)

> *A comparison of the two sections, namely section 24 of the repealed Arbitration Act 1952 and the present section 42 are quite evidently different and distinct. Section 42 allows "any question of law arising out of an award" to be brought by "any party" by way of a reference to the High Court. Given the clearly wider ambit of this section, as compared to the prior section 24 of the repealed Arbitration Act, it is evident that the question that a court needs to ask itself is whether the question framed before it is indeed a question of law.* (para. 54)

[49] *The views expressed in Exceljade, supra, clearly differs from the earlier view expressed in Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd, supra, where I had expressed the view that the governing principles on error of law on the face of the award was "too well entrenched in our law to be simply discarded as an accident of legislation."* Counsel for the respondent has expressly referred to this passage and agreed with it.

...

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[51] *Since this case was decided, Parliament has inserted sub-s. (1A) to s. 42, such that as a matter of statutory interpretation, the court is now cautioned against setting aside or varying an award unless the error of law substantially affects the rights of parties. It would thus appear this particular jurisdiction is not to be lightly exercised by the courts, as indicated by the very terms of the provision: …*

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[52] *The statutory wording mandates the court to dismiss ("shall dismiss") the reference on the question of law unless the question of law affects in a substantial way the rights of the party or parties. Additionally, the court may require the arbitral tribunal to provide the reasons for its award if the award does not contain the reasons, or contain reasons*

C

that are not in sufficient detail.

The Effect Of *Exceljade*

[53] *With the amendment, and reading the provision in its overall context, the views expressed in Exceljade, supra, should perhaps now be preferred. However, on the special facts of a particular appeal,* the previous

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jurisprudence and the new law may just overlap. This is the position taken by the appellant. Counsel for the appellant submits:

> It is submitted that regardless of whether the test for section 42 of the AA 2005 is error of law arising out of

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> an award or question of law arising out of the award, the Malaysian authorities recognises that the arbitrator is the master of facts.

[54] *Nevertheless, the Exceljade approach will align our law with that of other jurisdictions where the old jurisprudence on "error of law on the face of the award" has been rejected.*

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[55] Our Act, being closely modelled on the New Zealand legislation, it will be helpful in particular to state the approach taken in that jurisdiction, although, unlike our law, NZ law has an express statutory definition of "question of law", in the form of cls. 5(10)(a), (b) of Schedule 2 of the Arbitration Act

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1996. Nevertheless, the common statutory wording "arising out of an award" appears in both. A leading text in New Zealand, *Williams & Kawharu on Arbitration* (Lexis Nexis NZ; 2011) analyses the law thus:

> 18.4.4. Meaning of "arising out of an award" The

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> question of law must, in terms of Clause 5(1), be a question "arising out of an award" ... Clause 5(10)(a) also makes clear that the question does not need to appear "on the record." A question of law may arise out of an award if there is no explicit ruling on the matter, provided that the question is not a new point and can be argued

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> on the facts found by the Tribunal, on the basis that the Tribunal has applied the wrong legal standard to the facts ... (at page 516 of the text)

[56] *The broader approach that a question of law "arising out of an award" should not be taken to mean that the question of law must appear "on the record" (ie, within the four corners of an award), will be consistent with our own statutory scheme, especially when s. 42(4) is considered.*

(emphasis added); and

(b) Nallini Pathmanathan J (as Her Ladyship then was) decided as follows in *Exceljade Sdn Bhd*, at paras. 62, 82, 84 and 85:

[62] *... The primary consideration under s. 42 now would be whether a question of law or error of law arises out of the award which could substantially affect the rights of the parties. The existence of this provision detracts from the position that the test of an "error of law on the face of the record" is the applicable test or approach to be adopted in determining a reference on a question of law under s. 42.*

…

[82] *It is evident from a perusal of the award at the aforesaid paragraphs that the learned arbitrator has fully considered the parties' respective arguments. Having considered the same I am unable to conclude, with respect, that the learned arbitrator erred in law in arriving at the conclusion he did.*

…

[84] *Even if it is contended that the arguments put forward by the applicant here more correctly reflect the position in law, this alone is insufficient to warrant interference from this court under s. 42 [AA]. This is because the reasoning and application of legal principles by the learned arbitrator is not so flawed as to warrant the conclusion that the arbitrator has proceeded on principles of construction which the law does not countenance.*

[85] *Applying the test in The Chrysalis, it is not possible to conclude that the learned arbitrator committed an error of law warranting interference by this court, because his reasoning is entirely tenable and not contrary to the principles of contract law.*

(emphasis added).

[53] The problem regarding whether the first or second approach should be applied for a court reference under s. 42 AA, is explained in *MMC Engineering Group Bhd*, at para. 85, as follows:

[85] It is perhaps, unfortunate that other than providing for the matters alluded to, section 42 does not provide for the correlation between the question of law identified and what the parties are expected to establish.

[54] For reasons stated in *Exceljade Sdn Bhd*, I am of the respectful opinion that the second approach should be favoured.

[55] In the determination stage, the court may consider documents referred to in the award. This is clear from Mary Lim Thiam Suan J's judgment in *MMC Engineering Group Bhd*, at para. 41, as follows:

> [41] *Further, it is only after all these pre-qualifications or conditions have been met will the Court then proceed to determine those questions of law. When determining this reference, the Court is necessarily directing its focus and attention to the four corners of the award and nothing more; although this may extend to the documents or correspondence that were referred to or mentioned in the award. I do not believe that one should be inflexible here as the Court may sometimes need to examine the particular document or correspondence referred to in the award in order to determine the question of law posed. Similar views can be found in Kershaw Mechanical Services Ltd v. Kendrick Construction [2006] EWHC 727.*
>
> (emphasis added).

[56] In deciding a court reference, I accept Mary Lim Thiam Suan J's judgment in *MMC Engineering Group Bhd*, at paras. 126 and 127, on how an award should be construed:

> [126] Following this Court's earlier observations on the requirements of section 42, *any question of law posed must be determined by reference to the whole award. In as much as the Plaintiffs have complained about certain parts of the Award, there is much of the Award that they have not complained of; in which case, reasonably, the Plaintiffs must be taken to be plainly, fully and completely satisfied with those findings and reasoning.* In fact, the Plaintiffs have pointed out that there are no challenges on the factual findings; and implicitly much of the Arbitral Tribunal's legal reasoning. *In my view, any award which is challenged must be read and scrutinised in a fair and reasonable manner, and in its entirety, in order to appreciate and understand its full meaning and implication, especially in relation to the terms of the reference to arbitration in the first place. An award, including the present Award, must never be read in segments, instalments or without context. To do so would be a discredit to the Award and to the Arbitral Tribunal that had so carefully and ably reasoned that Award, and perhaps even disrespectful of the parties' choice of dispute resolution.*
>
> [127] *It is therefore not open to the Plaintiffs to read isolated parts of the Award, ignoring the rest which is what I find the Plaintiffs to have done here. In a challenge under section 42, the Plaintiffs' arguments would be evaluated against the unchallenged parts of the Award to see if there is any inconsistency in the approach and positions taken. More significantly, such evaluation goes a long way in establishing whether the Plaintiffs' substantial interests have at all been affected.*
>
> (emphasis added).

Relief Stage

[57] If a plaintiff manages to persuade the court, either by way of the first or second approach, that the court should intervene in respect of an award, the court is not bound to set aside or vary the award under s. 42(4) AA.

The use of the word "may" in s. 42(4) AA confers a discretion on the court to grant any relief as the court sees fit. This is clear from the judgment of Hamid Sultan JCA in *SDA Architects*, at p. 660, as follows:

> [49] *Taking the lead from the decision of the Court of Appeal in the Crystal case, it is my considered view that even though a litigant may satisfy s. 42 of AA 2005 that does not mean the award must be varied or be set aside in whole or part.*

(emphasis added).

Time Period For Court Reference Has Been Exceeded In This Case

[58] As held in *Chip Lam Seng Bhd*, AA does not provide for the court's power to extend the time period for court reference. There is no provision in the AA equivalent to s. 80(5) of the 1996 Act which reads as follows:

> 80. Notice and other requirements in connection with legal proceedings.
>
> …
>
> (5) *Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement.*

(emphasis added).

[59] I have not overlooked para. 8 (para. 8) of the Schedule to the Courts of Judicature Act 1964 (CJA) which provides as follows:

> *Time*
>
> 8. *Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed;*
>
> Provided that this provision shall be without prejudice to any written law relating to limitation.

(emphasis added).

Section 25(2) CJA provides that the High Court shall have additional powers set out in the Schedule to CJA (which includes para. 8). Having said that, the proviso to s. 25(2) CJA states that the powers set out in the Schedule to CJA "shall be exercised in accordance with any written law". It is my view that based on the proviso to s. 25(2) CJA, para. 8 is subject to "written law" in the form of s. 42(2) AA (which provides for the 42 days period to file a court reference). My view is based on the following two cases:

(a) Suffian LP's judgment in the Federal Court case of *Damodaran v. Vesudevan* [1975] 1 LNS 23; [1975] 2 MLJ 231, at 232; and

(b) the judgment of a five-member coram of the Federal Court delivered by Suffian LP in *Public Prosecutor v. Lim Shui Wang & Ors* [1979] 1 MLJ 65, at 66.

Based on the proviso to s. 25(2) CJA, this court cannot exercise the power conferred by para. 8 to extend the 42 days period as stipulated in s. 42(2) AA.

[60] I have also considered O. 3 r. 5(1) RC which provides power to the court to extend "the period within which a person is required or authorised by (RC) … to do any act in any proceedings". Order 3 r. 5(1) RC may be relied on to extend the 42 days period as required by O. 69 r. 6(1) RC. However, it is my opinion that O. 3 r. 5(1) RC does not empower the court to extend the 42 days period as stipulated in s. 42(2) AA.

[61] As correctly contended in the defendant's written submission:

(a) the award was published on 21 December 2014 and received by the plaintiff's solicitors on 20 December 2014 (para. 13 of plaintiff's first affidavit); and

(b) the OS was only filed on 6 February 2015, 48 days after the receipt of the award by the plaintiff's solicitors on 20 December 2014.

[62] In view of the above reasons, the plaintiff has failed to comply with the mandatory time period for court reference as provided in s. 42(2) AA and O. 69 r. 6(1) RC. On this ground alone, the OS should be dismissed with costs.

[63] It is my hope that the Legislature may consider amending the AA to provide a provision along the lines of s. 80(5) of the 1996 Act. Such an amendment is necessary in the interest of justice as there may be meritorious court references which may not be filed within the mandatory 42 days period for various reasons, including the negligence of the plaintiff's solicitors (for which parties genuinely aggrieved by awards should not be penalised).

Salient Parts Of Award

[64] The salient parts of the award are reproduced below:

7.1 **Issues before the Tribunal**

a. Was there a misrepresentation by the [Defendant] that the [Defendant] were [sic] owners of the [2 Vessels] which entitled the [Plaintiff] to terminate the Agreement?

b. If there was a misrepresentation which entitled the [Plaintiff] to terminate the [Agreement], did they do so and are they therefore entitled to the refund of the [Deposit] paid?

c. In commencing the proceedings in the Johore Baru Sessions Court, did the [Plaintiff] breach the [Arbitration Clause]?

d. If there was a breach, what is the measure of damages payable? A

e. Is the loss of reputation claim maintainable under arbitration and if so, has there been proven a loss of reputation and what is the measure of damages payable?

…

B

8. *Was there a misrepresentation by the [Defendant] that the [Defendant] were [sic] owners of the [2 Vessels] which entitled the [Plaintiff] to terminate the Agreement?*

…

8.3 *In order to determine whether there was in fact a misrepresentation, one has to determine, as a question of fact, what representations were in fact made before deciding if that representation was in fact false justifying a termination.* C

8.4 Since the parties had reduced their agreement to the form of writing in the guise and form of the [Agreement], the Tribunal has to look at the [Agreement] and determine whether, within the four corners of the [Agreement], it is stated and/or warranted that the [Defendant] is the Owner of the [2 Vessels]. … *The Tribunal has noted that the description of "Sellers" is stated throughout the [Agreement] and nowhere in the [Agreement] is there any express warranty that the [Defendant] as Seller has ownership of the [2 Vessels].* D

E

…

8.6 *Applying the principles stated above, the Tribunal is of the view that the description and the rest of the contract clearly make no reference to the [Defendant] being the Owner of the [2 Vessels]. As such, the Tribunal is bound to hold that as a question of fact, there is nothing in the [Agreement] that made a factual representation that as seller, the [Defendant] was also the owner. On this ground alone, the [Plaintiff's] claim must fail.* F

…

8.13 *The Tribunal accepts the submissions of the [Defendant] that based on CW1's [Plaintiff's witness] own testimony, both in cross examination and in re-examination, that the [Plaintiff] is now estopped from denying the fact that they continued with the contract after knowledge that the [Defendant] was not in fact the owners of the [2 Vessels]. In this regard, the Tribunal need only to refer to the decision of the Federal Court in the case of Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331* … G

H

8.15 *A further point to be made, which is an extension on the estoppel argument, although not raised by either party, is that of the doctrine of waiver. Even if there has been a misrepresentation and even if the [Plaintiff] then had the right to terminate the Agreement, by making payment of the balance of RM100,000.00 and continuing to seek extensions to complete the [Agreement], the [Plaintiff] has by conduct waived their right to terminate and cannot thereafter rely upon the alleged breach. In this regard, the Tribunal need only to refer to the case of Charles Rickard Ltd v. Oppenheim* I

…

A

8.16 *Accordingly, it is the Tribunal's ruling that even if there was a misrepresentation, the [Plaintiff] have [sic] by conduct, waived their right to terminate the [Agreement] for that misrepresentation.*

8.17 *The Tribunal further states that the [Plaintiff's] submission on the contract being void under Section 21 of the Contracts Act 1950 [CA] cannot be accepted as the Section makes it quite clear that it has to be a mistake by both parties. The cases cited by Counsel for the [Plaintiff] in his submissions clearly point out that the mistake has to be mutual which is clearly not the case here.*

B

8.18 **Because the contract is not void, Section 66 [CA] would accordingly have no application to the present case.**

C

9. *If there was a misrepresentation which entitled the [Plaintiff] to terminate the [Agreement], did they do so and are they therefore entitled to the refund of the [Deposit] paid?*

9.1 *As the Tribunal has already ruled that there was no misrepresentation and even if there was it has been waived by conduct, there is clearly no right to demand the refund of the [Deposit].*

D

…

10. **In commencing the proceedings in the Johore Baru Sessions Court, did the [Plaintiff] breach the [Arbitration Clause]?**

E

…

10.2 *There is no doubt in the Tribunal's mind that commencing the proceedings in the civil court was a breach of the [Arbitration Clause]. The [Arbitration Clause] is treated as a collateral agreement between the parties that they have agreed to have any disputed adjudicated and determined by arbitration.*

F

10.3 *The issue which arises for determination by the Tribunal is whether a party can claim for costs expended in defending proceedings brought in breach of an arbitration agreement as damages in arbitration proceedings, thus bringing it within the jurisdiction of the Tribunal. The Tribunal answers this question in the affirmative based on the latest decision in the English High Court in the case of West Tankers Inc v. Allianz SpA & Anor [2012] EWHC 854 … The Tribunal further rules that commencing court proceedings in breach of the arbitration agreement, is in any event, a dispute "arising out of or in connection with this Agreement"*

G

(emphasis added).

H

Plaintiff Has Not Referred Any Question Of Pure Law To This Court

[65] It is to be noted that the OS did not specify any question of law to be determined by this court. The plaintiff's first affidavit only avers that the arbitrator has committed the first to seventh alleged errors in making the award.

I

[66] I am of the view that the first to seventh alleged errors do not involve any question of pure law. The first to seventh alleged errors concern factual matters as follows: A

(a) regarding the first alleged error, it is a question of fact as to whether the defendant is the owner of the two vessels or not;

B

(b) in respect of the second alleged error, it is a factual issue of whether the defendant has misrepresented to the plaintiff that the defendant is the owner of the two vessels;

(c) the third alleged error concerns a mixed question of fact and law on whether the defendant has breached the agreement. Whether a party has breached a certain contractual obligation depends on firstly, the interpretation of the contractual provision (question of law), and secondly, whether a certain act and/or omission of the party has contravened that provision (question of fact); C

(d) the arbitrator's alleged two failures to decide on the issues raised by the plaintiff and to state that the burden is on the defendant to deny the plaintiff's claim (the fourth alleged error), raises a factual and not a legal question; D

(e) the fifth alleged error (whether the defendant's counterclaim should be tried in the arbitration or in the Johor Bahru High Court) constitutes a mixed question of law (interpretation of the arbitration clause) and fact (whether the plaintiff is estopped from denying the jurisdiction of the arbitrator by proceeding to defend the defendant's counterclaim before the arbitrator); E

F

(f) the sixth alleged error concerns a question of fact of whether the arbitrator has committed a misconduct during arbitral proceedings; and

(g) whether the plaintiff is entitled to a refund of the deposit under s. 66 CA, namely the seventh alleged error, is a question of mixed law and fact. G

[67] As the first to seventh alleged errors do not concern any question of pure law, the OS can be dismissed with costs on the ground that no question of pure law has been referred to this court as required by s. 42(1) AA and O. 69 r. 6(1) RC. I find that in reality, the first to seventh alleged errors constitute "a disguised attempt by the (plaintiff) to appeal against the (award)" as explained in *Awangku Dewa*. H

Fourth, Fifth And Sixth Alleged Errors Do Not Arise From Award

[68] The arbitrator has identified only five issues to be decided in the award. The fourth, fifth and sixth alleged errors do not arise from the award as required by s. 42(1) AA and O. 69 r. 6(2)(a) RC. Accordingly, this court cannot consider the fourth, fifth and sixth alleged errors. I

Five Alleged Errors Do Not Substantially Affect Plaintiff's Rights

[69] The arbitrator has held that, among others:

(a) the plaintiff is estopped from alleging that the defendant is not the owner of the two vessels because the plaintiff has continued with the agreement by paying RM100,000 (the balance of the deposit) and by applying for extensions of time to complete the agreement (estoppel ruling); and/or

(b) by the plaintiff's above conduct, the plaintiff has waived its right to terminate the agreement for alleged misrepresentation by the defendant (waiver ruling).

[70] In view of the arbitrator's factual findings in the estoppel and waiver rulings, it is immaterial:

(a) whether the defendant is the owner of the two vessels (part of the first alleged error);

(b) whether the defendant has misrepresented to the plaintiff that the defendant is the owner of the two vessels (part of the second alleged error);

(c) whether the defendant has breached the agreement (the third alleged error);

(d) whether the defendant has the burden to deny the plaintiff's claim (part of the fourth alleged error); and

(e) whether the plaintiff is entitled to a refund of the deposit under s. 66 CA (the seventh alleged error)

(five alleged errors).

[71] In view of the estoppel and waiver rulings by the arbitrator, the five alleged errors are not relevant. Hence, the five alleged errors do not affect the plaintiff's rights, let alone substantially affect the plaintiff's rights as required by s. 42(1A) AA.

Plaintiff's Non-Compliance With Procedural Threshold Requirements

[72] Assuming the plaintiff has referred questions of law which:

(a) arise from the award; and

(b) substantially affect the plaintiff's rights

– the plaintiff has failed to comply with the following five procedural threshold requirements (five breaches):

(i) no question of law has been clearly and sufficiently identified as required by s. 42(2) AA and O. 69 r. 6(2)(a) RC.

In *Awangku Dewa*, at p. 15, the Court of Appeal has decided that: A

(1) the plaintiff bears the legal burden to comply strictly with the requirement of framing clear and concise questions of law to be determined by the court; and

B

(2) if a question of law has not been clearly and concisely drafted, the court "must summarily dismiss" the court reference "without even attempting to answer" the question.

Mohd Hishamudin Yunus JCA has further held in the Court of Appeal case of *SDA Architects*, at pp. 639 and 640, that if no "proper and valid question of law" has been framed, this may render the question "invalid"; C

(ii) the OS did not comply with O. 69 rr. 4(1)(a)(ii) and 6(2)(a) RC by not stating the questions of law in the OS; D

(iii) in contravention of s. 42(2) AA and O. 69 r. 6(2)(b) RC, the OS did not state the grounds;

(iv) the plaintiff has breached O. 69 r. 6(2)(c) RC when the OS did not give the particulars of alleged errors of law; and E

(v) plaintiff did not comply with O. 69 rr. 2(1)(h), (3), 4(4) and 6(4) RC by not serving the OS and plaintiff's first affidavit on the arbitrator.

[73] It is to be noted that the plaintiff did not file an application to amend the OS so as to: F

(a) include clear and concise questions of law in the OS; and

(b) specify the grounds and particulars of alleged errors of law in the OS.

[74] I did not exercise my discretion to cure the five breaches under O. 2 r. 1(1) and (3) RC (with regard to the overriding interest of justice as provided in O. 1A RC) because the OS is doomed to fail for the following reasons: G

(a) the plaintiff has failed to comply with the mandatory time period for court reference as stipulated in s. 42(2) AA and O. 69 r. 6(1) RC; H

(b) the plaintiff did not refer any question of pure law in this case; and

(c) for reasons expressed later in this judgment, the plaintiff has failed to satisfy this court in the determination stage, irrespective of whether the first or second approach is used. I

A **No Error Of Law On The Face Of The Award**

[75] Based on *MMC Engineering Group Bhd*, at paras. 126 and 127, reading the award as a whole in a fair and reasonable manner, I cannot find any patent error of law to justify any court intervention in this case. Indeed, when asked by the court to show any error of law on the face of the award, the plaintiff's learned counsel was unable to do so. As such, adopting the first approach, the OS must be dismissed with costs.

B

No Error Of Law In Arbitrator's Reasoning Process

[76] In applying the second approach, I have perused the reasons given by the arbitrator in the award. I have also considered the agreement which was referred to in the award (the agreement may be considered by court as explained in *MMC Engineering Group Bhd*, at para. 41). I must commend the arbitrator for a clear and reasoned analysis in making the award. There is no error of law committed by the arbitrator in his process of reasoning, let alone an error of law which has substantially affected the plaintiff's rights. Accordingly, the adoption of the second approach does not warrant any judicial intervention in respect of the award.

C

D

No Need To Adjourn OS

[77] In view of the above overwhelming reasons to dismiss the OS, there is no necessity to adjourn the hearing of the OS so as to enable the plaintiff to file the plaintiff's second affidavit and plaintiff's written submission.

E

Court's Decision

[78] Based on the above reasons, the following is ordered:

F

(a) the defendant's application is dismissed with no order as to costs;

(b) the award is confirmed pursuant to s. 42(4)(a) AA; and

(c) the OS is dismissed with costs of RM5,000 to be paid by the plaintiff to the defendant.

G

H

I